



INTERIOR BOARD OF INDIAN APPEALS

Downtown Properties, Inc. v. Deputy Assistant Secretary - Indian Affairs (Operations)

13 IBIA 62 (12/27/1984)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

DOWNTOWN PROPERTIES, INC.

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 84-19-A

Decided December 27, 1984

Appeal from a decision canceling lease PSL-226, contract J53-C1420-3554, between Downtown Properties, Inc., and certain members of the Agua Caliente Band of Mission Indians.

Affirmed.

1. Indian Lands: Development--Indian Lands: Leases and Permits: Long-term Business/Agriculture: Waiver

The tender of rent by the lessee of Indian trust property and the acceptance of that tender by the Bureau of Indian Affairs on behalf of the Indian lessor does not bind the lessor to a waiver of a breach of the lease.

2. Indian Lands: Leases and Permits: Long-term Business/Agriculture: Rentals--Indian Lands: Leases and Permits: Long-term Business/Agriculture: Waiver

Whether the acceptance of rent by an Indian lessor after a default in specific provisions of a lease constitutes a waiver of those defaults is a question of the lessor's intent, which is determined on the basis of the facts of the particular case.

3. Indian Lands: Leases and Permits: Long-term Business/Agriculture: Cancellation

The Bureau of Indian Affairs is not required to give the lessee of Indian trust land a reasonable time in which to cure a breach of the lease when it has determined in accordance with 25 CFR 162.14 that the breach cannot be cured.

APPEARANCES: Bruce A. Ray, Esq., San Diego, California, for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On February 3, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Downtown Properties, Inc. (appellant), seeking review

of a December 7, 1983, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee). That decision canceled lease PSL-226, contract J53-C1420-3554 (PSL-226), between appellant and Clarice Bow Mathews, Allottee #PS-75; Nancy Marie Bow Soza, Allottee #PS-76; Ellen Rice, Allottee #PS-88; and R.S. McDermott for and on behalf of Lucille Ann Bow and Diana Bow, minors and heirs of Wilford Bow, Allottee #PS-80 (lessors). Lessors are all members of the Agua Caliente Band of Mission Indians. For the reasons discussed below, the Board affirms that decision.

Background

Lease PSL-226, which has a term of 65 years, was approved for the Secretary of the Interior on January 26, 1978. Under its terms, approximately 20 acres of undeveloped land on the Agua Caliente Reservation in Palm Springs, California, was leased to appellant. Three provisions of PSL-226 are at issue in this case. Article 7 required appellant to construct improvements on the leased property in excess of \$1,500,000 before January 25, 1982, and to construct \$2,000,000 in additional improvements before January 25, 1986. ^{1/} The article further provides four options for dealing with appellant's possible failure to complete the required construction. Article 12 required appellant to "submit to the Secretary for approval a general plan and architect's design for the complete development of the entire leased premises." This plan was to be submitted within 180 days after approval of the lease. Article 16 required appellant to post and maintain a 1-year's rental bond within 150 days after the lease was approved.

The Director of the Palm Springs Field Office, Bureau of Indian Affairs (Palm Springs BIA), sent repeated notices to appellant that it had failed to comply with the provisions of articles 12 and 16 of the lease. The administrative record contains copies of letters regarding these defaults dated August 24, ^{2/} August 31, and November 1, 1978; February 1, May 14, and September 4, 1980; January 9, February 23, April 20, and November 31 1981; and January 27, 1982. In addition, the November 3, 1981, and January 27, 1982, letters noted, respectively, probable failure and actual failure to complete the \$1,500,000 worth of improvements required by January 25, 1982. Several of the notices also alleged failure to provide a certificate of public liability and property damage insurance. The January 27, 1982, letter also alleges failure to pay the annual rental that was due on January 26, 1982. Appellee states that no response was received to any of these notices. Appellant does not dispute that contention.

On March 22, 1982, Palm Springs BIA wrote appellant and stated that PSL-226 was in default. It recommended that an amendment to the lease be negotiated in order to provide appellant with sufficient time to complete the required improvements. The letter noted, however, that even if construction were begun immediately, appellant would still be in default. On June 23, 1982, Palm Springs BIA again wrote appellant and stated that it had received

^{1/} By the terms of the lease, the leased premises were to be used for "real estate development: commercial, apartments, condominiums, hotel, rentals, and related facilities."

^{2/} This letter is headed "Second Notice."

no reply to its March 22, 1982, letter. There is no indication in the record that appellant ever responded to these letters or attempted to negotiate an amendment.

Although in January 1983 the required improvements had still not been constructed, appellant tendered rent in the amount of \$44,800 for lease year 1983-84. Appellant states that this amount included penalty rents as provided for in article 7(a) of its lease. The collection officer for the Palm Springs Field Office accepted payment on behalf of the lessors on January 31, 1983.

On March 1, 1983, Palm Springs BIA recommended that the Sacramento Area Director (Area Director) initiate cancellation of PSL-226 for breach of articles 7, 12, and 16. The Area Director accepted this recommendation and, on March 9, 1983, mailed to appellant a notice giving it 10 days from receipt of the notice to show cause why the lease should not be canceled for violation of articles 7, 12, and 16.

Appellant responded to the show-cause notice on March 24, 1983. In addition to setting forth its factual and legal arguments, appellant requested an adequate time to cure the alleged default.

On April 11, 1983, the Area Director acknowledged receipt of appellant's response. The Area Director informed appellant that further action would be withheld pending receipt of certain additional information from Palm Springs BIA. After receiving that information, the Area Director notified appellant by letter dated May 4, 1983, that PSL-226 was canceled. The letter noted that appellant had been notified 14 times by Palm Springs BIA that the rental bond and general development plans for the leased premises were due, but that appellant had failed to respond. The basis for the cancellation was that the lessors had the sole right to choose which option under article 7 they wished to invoke. Consequently, the Area Director asserted that appellant's choice to pay the rental penalty amount was not binding upon the lessors.

Appellant sought review by appellee of this decision. On December 7, 1983, appellee affirmed the Area Director's decision. Appellant then brought the present appeal to the Board. Only appellant has filed a brief on appeal.

Discussion and Conclusions

This Board has previously been called upon to review several BIA decisions canceling Palm Springs leases. ^{3/} In addition to these Board precedents, review in this matter is also guided by Sessions, Inc. v. Morton, 348 F. Supp. 694 (C.D. Cal. 1972), aff'd, 491 F.2d 854 (9th Cir. 1974), a

^{3/} See Linden Construction Corp. v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 145 (1984); Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983); Downtown Properties, Inc. v. Sacramento Area Director, 8 IBIA 248 (1981); Sessions, Inc. v. Miguel, 4 IBIA 84, 82 I.D. 331 (1975); Sessions, Inc. v. Ortner, 3 IBIA 145, 81 I.D. 651 (1974); Sunny Cove Development Corp. v. Cruz, 3 IBIA 33, 81 I.D. 465 (1974); Villa Vallerto v. Patencio, 2 IBIA 140, 81 I.D. 9 (1974).

case involving judicial review of a Secretarial decision to cancel another Palm Springs lease.

Appellant first argues that by accepting the increased rental payment of \$44,800 for lease year 1983-84, which it says included the penalty specified in article 7(a), 4/ the lessors have elected that remedy to the exclusion of cancellation, the remedy provided in article 7(d). Appellee does not dispute that the lease provides four options, any one of which could have been invoked upon appellant's failure to complete the required construction. In addition, the Area Director noted in his decision that article 7 specifically provides that "[i]f the Lessee [appellant] fails to complete improvement, development and construction within each such period, the Lessor may at Lessor's sole option" choose which of the four alternative penalties to impose. (Emphasis added.) See also Villa Vallerto, *supra*.

[1] Appellant's argument can be sustained only through a finding that acceptance of appellant's check by BIA on behalf of the lessors constituted acceptance by the lessors of appellant's choice to proceed under article 7(a). In Small v. Commissioner of Indian Affairs, 8 IBIA 18, 25 (1980), the Board held that the tender of rent and acceptance of that tender by BIA on behalf

4/ At pages 8-9 of its brief, appellant states that the lessors clearly knew as early as Nov. 3, 1981, that the required construction would not be completed by Jan. 25, 1982. Appellant notes that after that time "[l]essors accepted almost \$84,800 in rent and penalties." Appellant states, and exhibit 1 to its brief confirms, that \$44,800 was paid for lease year 1983-84. Therefore, according to appellant's figures, \$40,000 was paid as rent for lease year 1982-83.

The first year of this lease was 1978-79. Therefore, 1982-83 was the fifth year and 1983-84 was the sixth year. According to schedule B of the lease, \$40,000 was owed each year as rent for the fifth and sixth years of the lease.

In the event of default in construction, the option presented in article 7(a) provides that the minimum annual rentals will

"increase ten percent * * * at the beginning of the next lease year of this lease, and for each lease year thereafter that the Lessee [appellant] fails to complete such full improvement, development, and construction, the guaranteed minimum annual rentals payable under this lease shall be increased additionally two percent * * * of the previous year's rent."

Appellant was in default of the lease for failure to complete required construction as of Jan. 26, 1982. If the formula of article 7(a) were applied to this default, the minimum rental for lease year 1982-83, "the next lease year of this lease," would have increased to \$44,000, or an increase of 10 percent over the stated rent of \$40,000. The rent for lease year 1983-84 would have been \$44,880, or an increase of 10 percent over the stated rent of \$40,000 plus 2 percent of the prior year's increased rent of \$44,000. Thus, it appears that, for lease years 1982-83 and 1983-84, the 2 years appellant was in default of construction before cancellation, a total of \$88,880 should have been paid.

On the basis of appellant's own figures, it would seem that no penalty was paid for its default in failure to complete required construction for lease year 1982-83.

of an Indian lessor did not bind the lessor to a waiver of a breach of the lease. See also Downtown Properties, Inc. v. Sacramento Area Director, supra at 248-49 n.2. The same logic applies to the present situation, where the only distinction is purely semantic: Here appellant has argued that the lessors have "elected" one remedy to the exclusion of others; in Small and Downtown Properties the appellants argued that the lessor had "waived" other remedies. This difference is not sufficient to remove appellant from the rule stated in Small. Therefore, BIA's acceptance of appellant's tendered rent and penalty does not constitute an election by the lessors to proceed under article 7(a) of the lease.

[2] Next, the facts of this case must be examined to see if the lessors personally took any action that would constitute their acceptance of appellant's determination to pay the penalty amount specified in article 7(a). The Ninth Circuit Court of Appeals held in Sessions, Inc., supra, 491 F.2d at 858, that "[w]hile it is a generally stated rule that the lessor's acceptance of rent after the lessee's breach implies a waiver of that breach, this concept, involving the knowing relinquishment of a right, is a matter of intent which necessarily depends on the factual circumstances of each case." In Sessions, negotiations continued for 3 years after the breach. The lessor was found not to have waived the breach by accepting rent during those 3 years. See also Sessions, Inc. v. Miguel, supra; Sessions, Inc. v. Ortner, supra; Sunny Cove Development Corp., supra.

In this case, appellant's failure to complete construction by January 25, 1982, constituted default. Rent was accepted for lease year 1982-83. At this point, the lessors apparently intended to allow appellant additional time in which to complete its contractual obligations. Appellant's check for lease year 1983-84, which allegedly included the penalty amount, was received by BIA on January 31, 1983. On March 1, 1983, Palm Springs BIA recommended that cancellation procedures be initiated. The Area Director concurred and mailed the show-cause notice to appellant on March 9, 1983. Analyzed in accordance with the Ninth Circuit's holding, the lapse of only 1 month between appellant's alleged payment of the penalty and the lessors' decision to seek cancellation of the lease provides a strong indication that the lessors did not intend to accept appellant's election simply to pay the penalty amount. Legally, the lessors were free to respond to appellant's default by choosing any of the options provided in article 7, including cancellation. 5/

5/ Appellant states that "Article 7(a) * * * is really an alternative means by which the Lessee may perform its obligations with respect to construction under the Lease. By paying the penalty rents, the Lessee has completely discharged its obligations under the Lease to date" (Brief at 6-7). This statement is a major over-simplification. Article 7(a) provides one means through which the lessors may willingly grant a dispensation to appellant in order to permit the continuation of the lease. The decision of whether to proceed under article 7(a) or under one of the other provisions of article 7 was entirely within the control of the lessors. As the Board noted in Small, supra, the primary consideration for the granting of the lease was the construction of income-producing improvements on the property, with the intent

Appellant next argues that the lessors, by accepting rent for the years following July 25, 1978, have waived any failure by appellant to submit plans or to post a rental bond as required by articles 12 and 16. Although the failure to complete required construction is itself sufficient cause to cancel this lease, there is also no evidence that the lessors waived the articles 12 and 16 defaults. The number of default notices sent to appellant from August 1978, immediately following initial default, through March 1983, when cancellation procedures were initiated, clearly shows that the lessors were consistently attempting to obtain compliance with all of the lease terms. Under these circumstances, the acceptance of rent for periods after the defaults under articles 12 and 16 does not constitute waiver of the defaults. 6/

[3] Finally, appellant contends that it should have been granted a reasonable time in which to cure its defaults following its response to the March 9, 1983, notice to show cause. Under 25 CFR 162.14, which is incorporated by reference in the first paragraph of the lease, 7/ a lessee in default must be given a 10-day period

in which to show cause why the lease should not be cancelled. * * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach.

Appellant failed to give any indication during the 5 years it held the lease that it intended to fulfill its contractual obligations. Article 29 plainly states that "[t]ime is of the essence of this contract." See Idaho Mining Corp. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 249, 90 I.D. 329 (1983). When appellant made no progress toward commencing the construction of \$1,500,000 worth of improvements during the first 4 years of the lease, the time within which the construction was required, or during the additional year given to it by the lessors' forbearance in not canceling after the January 25, 1982, default, it was reasonable to conclude that the breach was so substantial that it could not be corrected. Under the circumstances, BIA was not required to give appellant further additional time in which to correct its 5-year failure to abide by the terms of the contract.

fn. 5 (continued)

that the lessor would ultimately realize greater advantages from the construction and operation of those improvements than from the initial payment of rent. Although the rent in the present case is much higher than that in Small, it is no substitute for the construction of the improvements and the income eventually to be realized from their operation.

6/ The Board rejects appellant's reliance on Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P.2d 71 (1931). For a similar rejection, see also Sessions, Inc. v. Morton, supra; Sessions, Inc. v. Ortner, supra.

7/ Part 162 of 25 CFR was formerly numbered Part 131. The part number was changed without substantive change to the regulations by notice published in the Federal Register. See 47 FR 13327 (Mar. 30, 1982).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 7, 1983, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed.

//original signed
Bernard V. Parrette
Chief Administrative Judge

We concur:

//original signed
Jerry Muskrat
Administrative Judge

//original signed
Anne Poindexter Lewis
Administrative Judge