



INTERIOR BOARD OF INDIAN APPEALS

GOutdoor Media, Inc. v. Acting Eastern Regional Director, Bureau of Indian Affairs

62 IBIA 93 (01/11/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

GOUTDOOR MEDIA, INC.,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 14-072
ACTING EASTERN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	January 11, 2016

GOutdoor Media, Inc. (Appellant) appealed to the Board of Indian Appeals (Board) from a February 13, 2014, decision (Decision) of the Acting Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA), cancelling Sublease Agreement No. SL-3217 (Sublease) for nonpayment of rent. The Sublease was between Elton Carl Baxley (Baxley), as sublessor, and Appellant, as sublessee, and was approved by the lessor, the Seminole Tribe of Florida (Tribe). Appellant asserts that, beginning with the second semiannual rental period, it properly “abated,” in full, rent that was otherwise owed to Baxley and the Tribe under the Sublease.

We affirm the Decision. The administrative record supports the Regional Director’s findings that Appellant was not in compliance with its rent obligation and failed to cure or excuse its noncompliance. On appeal, Appellant asserts, but fails to show, that it met the requirement of the Sublease to provide written notice of an election to abate rent. And, even were we to find that Appellant provided sufficient notice, we agree that Appellant did not show that it had grounds for an equitable abatement of rent under the Sublease, nor has Appellant identified any other authority for withholding rent.

Background

On October 18, 2012, Appellant and Baxley entered into the Sublease, for a term of 10 years, which requires Appellant to construct and operate an “illuminated, digital video, light emitting diode (LED), or Tri-vision” outdoor advertising billboard on a portion of

the property that Baxley leases from the Tribe.¹ Sublease, Oct. 18, 2012, at 1 and Art. 3-4 (AR 9). The Sublease was approved by the Tribal Council Chairman and the Regional Director. *Id.* at 35.

Prior to the Sublease, in 2010, Appellant and Baxley had entered into a 5-year revocable permit for operation of a billboard. *See* Tribal Council Resolution No. C-365-12, July 13, 2012 (Resolution), at 1 (AR 5). After the permit issued, and before the Sublease, the Tribe approved a billboard sign ordinance that grandfathered Appellant's traditional (fixed sign) billboard and provided that digital billboards would not be allowed unless authorized by a Tribal Council resolution approving a lease. *See* Resolution at 1; Billboard Sign Ordinance No. C-03-11 (effective Apr. 1, 2011) (Ordinance) (AR 2). On July 13, 2012, the Tribal Council issued the Resolution approving the Sublease for construction and operation of a "two-sided mechanical and digital billboard." Resolution at 2-3. The Sublease requires Appellant to comply with applicable laws and ordinances, but also provides that "[n]otwithstanding" that requirement, Appellant "shall not be deemed to be in default hereunder of the Tribe's restrictions concerning outdoor advertising pursuant to the [Ordinance]." Sublease at Art. 3(A).

Under the Sublease, Appellant must pay semiannual rent to Baxley (80% of rent) and the Tribe (20% of rent), and rent is calculated by a flat fee² or a specified percentage of the gross revenue earned from the billboard, whichever is greater. *Id.* at Art. 5(A); Letter from Tribe's Realty Services Officer to BIA, Jan. 3, 2014, at 1 (AR 13). The Sublease provides that rent is due "not later than fifteen (15) calendar days after each successive semiannual rental period," for the next rental period, and "shall be paid without prior notice or demand, and without any setoffs or deductions whatsoever." Sublease at Art. 5(A), (E).

As pertinent to Appellant's arguments concerning abatement of rent, the Sublease authorizes abatement as follows:

If for any reason the visibility of the advertising sign faces to the Florida Turnpike shall become materially obstructed or destroyed in any manner whatsoever; . . . or the Sub-Lessee is prevented by law or ordinance, or by any authority having jurisdiction, from constructing or maintaining the

¹ The original lease is a Homesite Lease, No. HL-2207 (Lease). Lease, Jan. 19, 2004 (Administrative Record (AR) 1). A modification of the Lease permits Baxley to sublease a portion of the leasehold for construction and operation of a billboard for commercial rental purposes. Lease Modification, Oct. 18, 2012 (AR 7).

² The semiannual flat fee rent was initially \$30,000. Sublease at Art. 5(B). After the first year, the semiannual rent was to be adjusted annually upwards by 2.5%. *Id.*

Signs, then this Sub-Lease may be terminated or rent equitably abated at the option of Sub-Lessee upon thirty (30) calendar days written notice to the Sub-Lessor.

Sublease at Art. 32.

Appellant last remitted rent to Baxley in January 2013, and it last remitted rent to the Tribe in April 2013, completing payment of the flat fee rent for the initial rental period of October 18, 2012, through April 17, 2013. *See* Letter from Tribe's Realty Services Officer to BIA at 2 & Ex. A (Tenant Ledger, Jan. 3, 2014) (AR 13). Appellant remitted no rent for the second semiannual rental period of April 18, 2013, through October 17, 2013, for which rent was due on May 2, 2013,³ or for any subsequent period.

On May 15, 2013, Appellant wrote to Baxley, the Tribe, and BIA, raising three grievances concerning the Sublease. Letter from Richard J. Monescalchi, Esq., to Baxley, Tribe, and BIA, May 15, 2013 (May 15, 2013, Letter) (attachment to Letter from Monescalchi to BIA, Nov. 25, 2013) (AR 12). First, Appellant stated that, "recently," as Appellant was exploring the cost of upgrading the billboard, "it was discovered" that the Ordinance places an illumination restriction on signs located on residential properties.⁴ *Id.* at 1. Appellant advised that, based on the possibility that the Ordinance might be enforced, investment in the digital upgrade was financially "untenable" and development was at a standstill. *Id.* at 1-2. Appellant opined that the Sublease could not "override" the Ordinance and thus the Ordinance would need to be amended. *Id.* at 2. Second, Appellant asserted that, during a meeting on May 3, 2013, Baxley threatened to lock Appellant out of the premises, and that he did so on May 9, 2013, requiring Appellant to release a client from an advertising contract. *Id.* Appellant stated that, despite "assurances that the lock-out was done in error and that it will not happen again," the "constant threat of the sub-lessor restricting access" prevented Appellant from posting new advertisements or upgrading the billboard. *Id.* Third, regarding visibility of the billboard, Appellant asserted that there was "a need to trim the trees." *Id.* Appellant proposed, in resolution of all of the foregoing issues, to sell or assign the Sublease. *Id.* Appellant's letter did not mention any abatement of rent.

³ Fifteen days after the initial rental period ending on April 17, 2013, was May 2, 2013.

⁴ Appellant quoted paragraph 5(I)(vi) of the Ordinance, which states: "Billboards allowed under this Ordinance may be illuminated, except billboards allowed under paragraphs 4(A) and 4(B) of this Ordinance shall have their lights turned off between the hours of 11:00 PM and 7:00 AM."

After the second semiannual rental period ended, on October 18, 2013, Appellant again wrote to Baxley, the Tribe, and BIA. Letter from Monescalchi to Baxley, Tribe, and BIA, Oct. 18, 2013 (Oct. 18, 2013, Letter) (attachment to Letter from Monescalchi to BIA, Nov. 25, 2013) (AR 12). Appellant stated that it was being “threatened with default, for an alleged failure to pay rent,” and that under Article 32 of the Sublease, “rent can be equitably abated *at the option of the sub-lessee* when there is an obstruction to the sign or in the event that the sub-lessee is prevented by law or ordinance from utilizing the lease terms.” *Id.* at 1. Appellant asserted that it was given assurances that the trees would be trimmed and the Ordinance would be revised, but that neither had occurred. *Id.* Appellant continued, “[t]hese two issues are currently affecting [Appellant’s] ability to rent sign space and to obtain financing for the conversion to digital.” *Id.* at 1-2. Appellant closed by stating that it had been approached by a prospective purchaser or assignee of the Sublease, and that “[a]t this point [it was] demanding that the [Tribe] exhibit fair play in this negotiation.” *Id.* at 2.

On October 31, 2013, Baxley and the Tribe issued a notice to Appellant that it was in default of Article 5 of the Sublease for failure to pay rent for the second semiannual rental period of April 18, 2013, through October 17, 2013, and for the following rental period of October 18, 2013,⁵ through April 17, 2014. Letter from Baxley to Appellant, Oct. 31, 2013, at 1 (AR 10).⁶ According to the notice, Appellant owed, based on the flat fee rent for that combined 1-year period, \$48,600 to Baxley, and \$12,013.82 to the Tribe, plus late charges. *Id.* The notice advised that, pursuant to Article 19 of the Sublease, Appellant would have 30 days to cure the default.⁷ *Id.* at 1-2. The notice also advised that BIA would be issuing a notice of violation under its leasing regulations at 25 C.F.R. Part 162. *Id.* at 2.

On November 7, 2013, the Regional Director issued a notice to Appellant under 25 C.F.R. § 162.618 (2011) that it would have 10 days to cure the violations alleged by Baxley and the Tribe; dispute BIA’s determination that the violations had occurred and/or

⁵ In actuality, rent for the semiannual rental period beginning October 18, 2013, was not due until 15 days after the prior semiannual rental period, i.e., until *November 1, 2013*. See Sublease at Art. 5(A).

⁶ The notice also stated that Appellant was in default of Article 5 of the Sublease for failure to submit a gross revenue statement and any additional rent owed for the initial semiannual rental period. AR 10 at 1.

⁷ Article 19 of the Sublease provides that Appellant may cure a default within 30 days after written notice of the default, and if the default is not timely cured, then Baxley, with notice to the Tribe and the Secretary, may terminate the Sublease (among other options). Sublease at Art. 19(B)(2).

explain why the Sublease should not be cancelled; or request additional time to cure the violations.⁸ Letter from Regional Director to Appellant, Nov. 7, 2013 (Notice of Violation), at 1 (AR 11).

In response, Appellant “disagree[d]” with cancellation based on nonpayment of rent and referred the Regional Director to Appellant’s May 15, 2013, and October 18, 2013, letters discussed above, which “set forth [Appellant’s] position in this matter.” Letter from Monescalchi to BIA, Nov. 25, 2013 (AR 12).⁹

The Tribe’s Realty Services Officer then wrote to BIA regarding Appellant’s response. Letter from Tribe’s Realty Services Officer to BIA, Jan. 3, 2014 (AR 13). First, the letter detailed Appellant’s payment history and reiterated that Appellant was in arrears for 1 year’s rent. *Id.* at 1-2. Next, the letter asserted that the Sublease “waived” the illumination restriction in paragraph 5(I)(vi) of the Ordinance. *Id.* at 3. Specifically, the letter cited Sublease Article 3 (“Permitted Use”), paragraph (A) (Appellant “shall not be deemed to be in default hereunder of the Tribe’s restrictions concerning outdoor advertising pursuant to the [Ordinance]”) and paragraph (B) (“the installation, operation and maintenance of the Signs shall at all times . . . comply with all applicable governmental[] laws and regulations[] (with the exception of [the] Tribe’s restrictions applicable to outdoor advertising as set forth in Article 3.A.)”). *Id.* The letter also stated that neither the Tribe nor Baxley had enforced the Ordinance against Appellant. *Id.* According to the letter, Appellant continued to operate the billboard under the revocable permit after the Ordinance’s illumination restriction became effective, without any known problems. *Id.* The letter also asserted that, since April 18, 2013, Appellant had been “continually” advertising and collecting payments from vendors while not remitting rent. *Id.* Lastly, the letter stated that visibility of Appellant’s two-sided billboard was not obscured when viewed from either direction on the Florida Turnpike, and it included photographs taken of the signs during the “last week.” *Id.* at 3-4.

⁸ The Sublease incorporates by reference BIA’s leasing regulations at 25 C.F.R. Part 162 “and any amendments thereto relative to leases on restricted Indian lands.” Sublease at 1. New leasing regulations became effective on January 4, 2013. Final Rule, *Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. 72440 (Dec. 5, 2012). BIA’s use of the previous regulations, in issuing the notice of violation, does not affect our decision.

⁹ We note that Appellant’s response was within the 30-day period afforded by the Sublease to cure the alleged default, but after the 10-day period set forth in the Regional Director’s notice of violation. The Regional Director did not purport to cancel the Sublease based on the timeliness of Appellant’s response to BIA’s notice of violation, and thus we do not address this issue further.

On February 13, 2014, the Regional Director, citing 25 C.F.R. § 162.467 (2014) (What will BIA do if the lessee does not cure a violation of a business lease on time?), cancelled the Sublease for nonpayment of rent. Decision, Feb. 13, 2014, at 2 (AR 14). In sum, the Regional Director found that the “record . . . does not show that a requisite 30-day written notice of . . . rent abatement was provided to [Baxley],” and that Appellant did not demonstrate any grounds for abating rent. *Id.* As to Appellant’s arguments concerning the Ordinance, the Regional Director determined that Article 3(A) and (B) of the Sublease “excepts” the billboard from the Ordinance’s outdoor advertising restrictions. *Id.* at 1-2. The Regional Director also found that no action had been taken to enforce the Ordinance against Appellant. *Id.* at 2. Regarding access to the billboard, the Regional Director found that, based on Appellant’s statements in its May 15, 2013, letter, access had been restored, and “[n]o further incidents of that nature have been alleged or otherwise reported.” *Id.* Finally, the Regional Director found that the photographs provided by the Tribe showed that the signs were visible from both directions of traffic on the Florida Turnpike. *Id.*

Appellant appealed to the Board and included arguments with its notice of appeal. The Regional Director filed an answer brief. Appellant did not file a reply brief.¹⁰

Discussion

On appeal, Appellant argues that the Decision contains several “factual discrepancies.” Notice of Appeal, Mar. 7, 2014, at 1. Appellant claims that it gave the “requisite 30-day notice” that it was electing to abate rent, and submits as proof a letter from Appellant to Baxley dated May 1, 2013, which was not contained in the administrative record before the Regional Director. *Id.* at 3 & Attach. (May 1, 2013, Letter). Appellant also argues that: (1) the Regional Director erred in determining that the Sublease “excepts” the billboard from compliance with the Ordinance; (2) even though no enforcement action has been taken, the possibility of enforcement has made it prohibitive for Appellant to obtain financing to upgrade the billboard; (3) contrary to the Regional Director’s decision, Appellant has not had access to the billboard since May 2013, except for 1 day in October 2013, and has received no billboard revenue since October 2013; and (4) at the time of Appellant’s May 1, 2013, letter, the billboard was “block[ed]” by trees located on property owned by the Florida Department of Transportation (FDOT), despite previous “assurances . . . that the visibility problem . . . would be addressed with FDOT.”

¹⁰ After briefing concluded, the Regional Director filed a motion for an appeal bond or to make the Decision effective immediately. Appellant filed an objection to the motion. On February 27, 2015, the Board denied the Regional Director’s motion because it was undisputed that during the pendency of the appeal Appellant was dispossessed of the subleased premises.

Notice of Appeal at 2. Appellant attaches to its notice of appeal “recent” photos that purport to show a visibility problem. *Id.* at 3 & Attach. (photos).

We affirm the Decision because Appellant fails to establish that it provided the notice required by the Sublease *before* beginning to “abate” rent. And, even were we to conclude that Appellant provided sufficient notice, we agree that Appellant has not shown any grounds for abatement—much less grounds for abatement of all rent—under the Sublease or any other authority.

I. Standard of Review

The Board reviews *de novo* questions of law, which include interpretations of lease provisions. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011). When construing a lease, the Board considers whether the language is clear, complete, and unambiguous, and if so, the Board gives effect to the expressed intent of the lease. *Black Weasel v. Rocky Mountain Regional Director*, 59 IBIA 258, 261 (2014); *High Desert Recreation, Inc. v. Western Regional Director*, 57 IBIA 32, 39 (2013). When a BIA decision involves the exercise of discretion, the Board will not substitute its judgment for BIA’s, but will review *de novo* the sufficiency of the evidence to support BIA’s decision, and will also review the sufficiency of BIA’s explanation. *Seminole Tribe*, 53 IBIA at 210. It is Appellant’s burden to prove that BIA’s decision was erroneous, was not supported by substantial evidence, or was an abuse of discretion. *See id.*

II. Analysis

A. Appellant Did Not Give the Required Notice of Abatement

The Sublease expressly requires Appellant to give Baxley 30 days’ written notice of an election to abate rent. Sublease at Art. 32. The Regional Director determined, and we agree, that based on the record Appellant did not provide Baxley with the required notice. Decision at 2. Prior to the May 2, 2013, due date for rent covering the second semiannual rental period (April 18, 2013, through October 17, 2013), the record contains no correspondence from Appellant to Baxley (or any other party) mentioning abatement. Nor does Appellant’s subsequent May 15, 2013, letter mention abatement. At best, the record shows that, more than 5 months after the due date for rent, and the day after the second semiannual rental period ended, Appellant sent an October 18, 2013, letter citing Article 32

of the Sublease in connection with its complaints that the Ordinance had not been amended and the trees had not been trimmed.¹¹ See Oct. 18, 2013, Letter at 1-2.

We also agree that Appellant's May 1, 2013, letter submitted on appeal does not show that Appellant provided timely notice of its election of abatement. Even assuming that the letter, which is unsigned, was delivered to Baxley on May 1, 2013, as Appellant claims,¹² Notice of Appeal at 2-3, such a notice was due *30 days before* the May 2, 2013, due date for rent. See Sublease at Art. 32. The letter itself requested abatement "within 30 days of the date of this notice." May 1, 2013, Letter at 2. Moreover, the letter proposed abatement in the amount of \$14,130, based on a purported estimate of the cost to address the alleged visibility problem. See *id.* (stating that tree trimming would cost \$12,130 and that an additional \$2,000 was necessary to obtain a permit from the FDOT). The letter did not propose to abate all rent, and did not propose abatement for any other reason. On appeal, Appellant does not deny that it has remitted no rent since April 2013, and that at the time of the Regional Director's notice of violation and the Decision, the total unpaid rent was over \$60,000.¹³ Accordingly, Appellant has not met its burden to show error in the Regional Director's determination that Appellant failed to pay rent and failed to give timely notice of its purported election to abate rent.

B. Whether Appellant Had Grounds to Abate Rent

Even were we to conclude that Appellant provided sufficient notice of abatement, Appellant fails to show that it had grounds to abate rent under the Sublease. The Sublease allows abatement in limited circumstances, including as relevant to Appellant's arguments: 1) if "the visibility of the advertising sign faces to the Florida Turnpike shall become materially obstructed or destroyed"; and 2) if Appellant "is prevented by law or ordinance, or by any authority having jurisdiction, from constructing or maintaining" the signs. Sublease at Art. 32.

¹¹ Even then, after Appellant acknowledged that it was being "threatened with default" for nonpayment, Appellant noted that the Sublease includes an "*option of the sub-lessee*" (Appellant's emphasis) to equitably abate rent, and asserted that it had grounds to abate rent, without explicitly electing that option. Oct. 18, 2013, Letter at 1-2. In contrast, Appellant unequivocally stated that "[a]t this point [it was] demanding" fair negotiations in a potential sale or assignment of the Sublease. *Id.* at 2.

¹² The letter states that it was "submitted" on May 3, 2013, and Appellant's May 15, 2013, letter mentions only a May 3, 2013, meeting with Baxley. See May 15, 2013, Letter at 2.

¹³ While Appellant's May 1, 2013, letter requests an "adjustment for overpayments of rent," it does not quantify or substantiate the basis for any adjustment. May 1, 2013, Letter at 2.

On appeal, Appellant again argues that “there were assurances given” that the alleged visibility problem would be addressed. Notice of Appeal at 2. Appellant has provided no proof of any such assurances. To the contrary, the Decision found, based on photographs submitted by the Tribe and contained in the record, that the billboard signs were “visible from both directions of traffic” on the Florida Turnpike. Decision at 2; AR 13 at 4 (photographs taken during the week prior to January 3, 2014). Appellant argues that it did not receive the Tribe’s photos and, for the first time on appeal, Appellant supplies its own “recent” photographs, which purport to show that trees “are creating” a visibility problem. Notice of Appeal at 3 & Attach. (photos). But Appellant’s photos do not necessarily reflect the conditions that were present at the time Appellant began “abating” rent. And, unlike the photos in the administrative record, which clearly are taken from the Florida Turnpike, it is unclear from what vantage points Appellant took its photos, which do not show either traffic or the roadway as context. Thus, Appellant has not met its burden to show error in the Regional Director’s conclusion that the visibility of the billboard signs was not materially obstructed or destroyed within the meaning of the Sublease.

Turning to Appellant’s argument that the Ordinance restricted Appellant’s ability to finance the digital upgrade to the billboard, we agree with the Regional Director that this did not provide a basis to abate rent. By its plain terms, Article 32 allows for abatement when the sublessee “is prevented” from “constructing or maintaining” the signs. Sublease at Art. 32. It is undisputed that the Ordinance was in effect when the Sublease was entered into, that the Sublease expressly addressed the relationship between the Ordinance and the Sublease, and that the Ordinance’s illumination restriction has never been enforced against Appellant.¹⁴ Nor does Appellant allege that Baxley or the Tribe actually threatened enforcement. Appellant has not shown that the Ordinance’s illumination restriction prevented construction or maintenance of the signs. Appellant’s inability, or unwillingness, to finance or pay for the upgrade to digital format does not fall within the plain terms of Article 32.

Next, we reject Appellant’s contention that it was authorized to abate rent based on alleged denials of access to the billboard. Neither Appellant’s May 1, 2013, letter nor its October 18, 2013, letter that cited Article 32 of the Sublease discussed any access problems. Appellant’s May 15, 2013, letter referenced an incident in which Baxley locked Appellant

¹⁴ The Sublease is clear that a violation of the Ordinance’s illumination restriction would not constitute *default* under the Sublease. See Sublease at Art. 3(A)-(B). We need not resolve, as the Regional Director determined, whether the Sublease “excepts” the billboard from the Ordinance’s illumination restriction.

out on May 9, 2013,¹⁵ however, that was after the May 2, 2013, due date for rent. The Regional Director correctly found that the administrative record contained no reports of any subsequent instances. Decision at 2. And, as Appellant’s allegation that it was denied access to the billboard focuses on Baxley, Appellant does not show that it was prevented from constructing or maintaining the billboard signs by any “authority having jurisdiction.” See, e.g., May 15, 2013, Letter at 2 (asserting that “Baxley . . . clearly expressed his future actions of locking my client out of the property” and that there was a “constant threat of the sub-lessor restricting access” (emphasis omitted)). Article 32 of the Sublease does not address acts by the sublessor to prevent access, and no other Sublease provision authorizes abatement for such acts. Cf. Sublease at Art. 3(C) (“Sub-Lessor shall not in any material way obstruct [Appellant’s] ability to access the Premises.”). Thus, Appellant fails to show that it had grounds to abate rent based on alleged denials of access.

Finally, Appellant identifies no other provision of the Sublease or other authority that authorized Appellant’s “abatement” of rent. As the Board has previously explained, “unless the lease provides or the parties agree otherwise, the tenant’s obligation to pay rent is ordinarily independent of any claim he may have against the landlord.” *Brown v. Acting Northwest Regional Director*, 58 IBIA 49, 54 (2013) (finding that appellant was not entitled to offset his rent payments to the tribe against the tribe’s alleged failure to compensate him); see also *High Desert Recreation*, 57 IBIA at 39-44 (affirming lease cancellation because appellant did not properly abate its rent and was not excused from paying rent based on alleged breaches of the lease by the lessor). Because Appellant did not satisfy its rent obligation and failed to cure or excuse its noncompliance, the Regional Director was within his discretionary authority to cancel the Sublease.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director’s February 13, 2014, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

¹⁵ The Tribe’s “Tenant Ledger” dated January 3, 2014, also contains an entry for a 2-day credit of rent, commencing May 8, 2013. AR 13, Ex. A.