

In the United States Court of Federal Claims

Case No. 08-114C
(Filed: March 3, 2011)
NOT FOR PUBLICATION

HUBBARD PROPERTIES, INC., and *
JAMES L. HUBBARD, *
Plaintiffs, *

v. *

THE UNITED STATES OF AMERICA, *
Defendant. *

William Robert Pringle, Christian & Small, LLP, Birmingham,
Alabama, attorney of record for Plaintiffs.

Jessica R. Toplin, U.S. Department of Justice, Washington, D.C., for
Defendant.

Amelia C. Moorstein, law clerk.

ORDER/OPINION

BASKIR, Judge.

Plaintiffs seek refund of the \$200,000 earnest money deposit tendered to the U.S. Department of Housing and Urban Development (HUD) after they were named the high bidder in a foreclosure sale. Defendant contends that it is entitled to retain the earnest money as liquidated damages because Plaintiffs failed to comply with the terms and conditions set forth in the sale agreement, which required registration on Defendant’s web page. Plaintiffs counter that they were prevented from complying because of Defendant’s computer malfunction. The Court finds that there are material facts in dispute as to which party was responsible for Plaintiffs’ failure to register. The Court therefore **DENIES Defendant’s Motion for Partial Summary Judgment.**

I. Background

The facts are taken from the Plaintiffs' Complaint and the parties' briefs. On September 14, 2006, HUD conducted a foreclosure sale of the Highland Village Apartments at 1024 Day Street Road in Montgomery, Alabama 36108. Mr. James Hubbard and Hubbard Properties, Inc. (Plaintiffs) submitted a bid for \$1.3 million. Defendant confirmed Plaintiffs as the high bidder.

The parties immediately executed an Acknowledgment by Bidder (Acknowledgment). The Acknowledgment set forth requirements of the high bidder as a condition for purchasing the Property. The high bidder was required to complete the "Previous Participation Certification" procedure (Certification Procedure), which requires that: (1) two days following foreclosure sale, the high bidder certify its registration in Active Partners Performance Systems (APPS), HUD's electronic database; and (2) fifteen days following foreclosure, the high bidder certify in the APPS its completion of various forms, collectively called the 2530 Submission Package (2530 Package). Upon completion of the Certification Procedure, HUD would approve the high bidder to purchase the Property and authorize the foreclosure officer to schedule closing.

The Acknowledgment contained the following liquidated damages clause:

Should Bidder fail or refuse to perform all obligations under this Acknowledgment for any reason including, but not limited to, failure to establish the legal entity that is to take title in a timely manner that permits Closing within the deadline set forth in Section 4, the earnest money deposit and any extension fees paid under Section 8, shall be remitted to and retained by HUD as liquidated damages.

Pursuant to the terms of the Acknowledgment, Plaintiffs tendered \$200,000 as an earnest money deposit after being named the high bidder at the foreclosure sale. Immediately after the sale, on Thursday,

September 14, 2006, Plaintiffs started the APPS registration process. The APPS registration process required two steps: first, Plaintiffs had to complete a form located at a specified URL; second, Plaintiffs had to wait 24 hours after completing this form to apply for a Coordinator ID.

Plaintiffs state that they spoke with an employee in the HUD Birmingham office on September 14, 2006. This individual directed Plaintiffs to the HUD Atlanta office. An employee in the HUD Atlanta office sent Plaintiffs a copy of the APPS "Quick Tips" that contained instructions for registering. Plaintiffs contend they followed the first step of the directions on the Quick Tips and were required to wait 24 hours to complete the second step, which was applying for a Coordinator ID.

Plaintiffs waited 24 hours, and on Friday, September 15, 2006, attempted to register a Coordinator ID. However, Plaintiffs state they could not obtain a Coordinator ID, even after multiple attempts. Every attempt allegedly ended with an internet browser error notice stating that the web page could not be displayed. Plaintiffs contacted the Atlanta office and spoke with two individuals, but still could not register.

After Plaintiffs were unable to close the transaction, they requested a refund of the earnest money. On November 7, 2006, HUD informed Plaintiffs that it was retaining the earnest money for failure to complete the Certification Procedure. The property was sold to a third party during the Spring of 2007. Plaintiffs contend they faithfully followed the directions for registering, but were frustrated by reason of a computer malfunction. The Government disputes the Plaintiffs' evidence that they were frustrated by the APPS malfunction. It offers evidence that there was no malfunction.

Plaintiffs filed a Complaint in our Court on February 26, 2008, alleging four causes of relief. The Court dismissed Counts I, II, and IV at the urging of Defendant and by stipulation of Plaintiffs. The subject of the current Motion to Dismiss is Count III, whereby Plaintiffs assert that Defendant is in breach of contract by its refusal to return the earnest money.

II. Discussion

A. Legal Standards

Summary judgment is appropriate when the record shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234, 1243 (Fed. Cir. 2007) (citing RCFC 56 (c)). A factual issue is “genuine” only if the Court could find for the party opposing summary judgment and “material” only if the issue could affect the judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party bears the burden of showing that no genuine issues of material fact preclude summary judgment. *Celotex Corp. v. Catrett*, 477 U.C. 317, 323 (1986). All justifiable inferences should be drawn in favor of the nonmovant. *Anderson*, 477 U.S. at 255. Nevertheless, the party opposing summary judgment must show an evidentiary conflict on the record. *Am. Airlines, Inc. v. United States*, 204 F.3d 1103, 1112 (Fed. Cir. 2000). A factually unsupported argument is insufficient to defeat a motion for summary judgment. *Id.* Instead, a party must offer “an evidentiary conflict created on the record at least by a counter statement of fact or facts set forth in detail.” *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006).

B. Material Facts in Dispute

The Court cannot weigh the credibility of opposing evidence on a Motion for Summary Judgment. Both parties have submitted conflicting evidence regarding Plaintiffs’ efforts (or lack thereof) to register for a Coordinator ID during the crucial two-day period set forth in the Acknowledgment. This case hinges on whether Plaintiffs correctly followed the procedure to register a Coordinator ID in APPS. If Plaintiffs did go through the correct procedure but were prevented from registering, Defendant effectively prevented Plaintiffs from complying with the terms of the contract. If Plaintiffs did not correctly execute the directions in the Quick Tips, then Plaintiffs breached the Acknowledgment.

Plaintiffs have attached exhibits to its Response supporting its contention that it made every possible effort to register but was prevented from doing so. These documents include (1) phone records documenting its calls to the HUD offices in Atlanta and Birmingham, and (2) deposition testimony of Bard Tomlin. Mr. Tomlin describes his actions in satisfying step one and his unsuccessful efforts to effectuate step two.

Defendant has produced two declarations of William Hill, a HUD employee who was Director of the Policy and Participation Standards Division during the dates at issue. Mr. Hill states that the functionality of the APPS registration system is demonstrated by (1) records showing the online registration system was functioning properly from September 15-20, 2006, (2) records showing 355 other actions were completed in HUD's system during these days, and (3) records showing that 73 of the actions during these days were successful applications for new Coordinator IDs. Defendant also stresses the lack of contemporaneously generated evidence demonstrating Plaintiffs' attempts to register a Coordinator ID.

While Defendant insists the evidence shows that the APPS registration system was working properly, Plaintiffs equally insist that the evidence shows the APPS registration system was *not* working properly. Both parties have produced sufficient evidence to support their conflicting contentions. This evidence shows a clear conflict of material fact that cannot be resolved on summary judgment.

III. Conclusion

For the foregoing reasons, **Defendant's Motion for Summary Judgment is DENIED.**

The parties are ordered to file a Joint Status Report proposing further proceedings no later than April 4, 2011.

IT IS SO ORDERED.

s/ Lawrence M. Baskir
LAWRENCE M. BASKIR
Judge