Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

January 10, 2001

GSBCA 15408-RELO

In the Matter of SAMUEL G. BAKER

Samuel G. Baker, Fort Worth, TX, Claimant.

Jerry W. Cochran, Director, Office of Finance, General Services Administration, Washington, DC, appearing for General Services Administration.

DeGRAFF, Board Judge.

In this request for an advance decision, see Rule 501 (48 CFR 6105.1 (2000)), the General Services Administration (GSA) asks whether it can reimburse a transferred employee for a security deposit and an option payment that he forfeited when he moved from a house that he leased at his old duty station. GSA wants to know whether either amount is reimbursable as a lease-breaking expense, or a residence transaction expense, or as part of the miscellaneous expense allowance. GSA might be able to reimburse the employee for the forfeited security deposit as a lease-breaking expense, and might be able to reimburse him for some of what he paid for the option as part of the miscellaneous expense allowance.

Background

In November 1999, Samuel Baker, an employee of GSA, leased a house on Pierson Way in Littleton, Colorado, and paid for an option to purchase that house. The agreements between Mr. Baker and his landlord are contained in three documents, the relevant parts of which are described below.

On November 21, 1999, Mr. Baker signed a tenant's purchase option. The purchase option said that, beginning on December 1, 1999, Mr. Baker had an option to purchase the Pierson Way house for $199,000. Mr. Baker had to exercise the option by November 30, 2000, or else it would expire. The purchase option stated that Mr. Baker paid $15,600 for the option and that this amount was not refundable. The $15,600 would be applied toward the purchase price only if Mr. Baker exercised the option. If Mr. Baker failed to exercise the option, if he recorded the option, or if he defaulted under the terms of his lease, the option would be void, and Mr. Baker's landlord would retain the money as liquidated

damages. The purchase option said that the parties agreed that it was not an installment land contract, a contract for deed, or an equitable mortgage, and was merely a right to purchase the Pierson Way property in accordance with the agreed-upon terms.

Also on November 21, 1999, Mr. Baker signed a lease/option deposit receipt. The deposit receipt said that before moving into the Pierson Way house, Mr. Baker was supposed to pay his landlord $1550 for the first month's rent, $15,600 for the option to purchase, and $1500 for a security deposit. These amounts total $18,650. The deposit receipt said that Mr. Baker paid $500 on November 29, that $1000 was due to be paid on November 29, and that $4000 was due on December 1, 1999. It also said that $10,000 was due to be paid, but it is unclear as to when that payment was due. The deposit receipt also called for the payment of some added amount in February 2000, but our copy of the receipt is not clear enough for us to determine that amount. The deposit receipt provided that all of the money paid by Mr. Baker was not refundable and would be kept as liquidated damages if he failed to tender all of the funds necessary to rent the Pierson Way house by February 1, 2000.

On November 26, 1999, Mr. Baker signed a lease. The lease was for a twelve month term, beginning December 1, 1999, and the rent was $1550 per month. The lease did not mention the security deposit and did not say what amounts, if any, would be due if Mr. Baker left before the lease term expired. Mr. Baker occupied the house, although the lease did not require him to do so. The lease also provided that it was the full and complete agreement of the parties and that it superseded all prior written agreements between them.

Mr. Baker provided money order receipts for payments to his landlord of $500 on November 29, and $1000 on December 17, 1999. He also provided a credit union check for $5000 dated December 3, 1999, and a cashier's check for $4000 dated March 8, 2000. The total of these payments is $10,500. There are no facts in the file to show whether Mr. Baker's landlord applied these payments to the security deposit, the first month's rent, or the payment for the option.

In mid-2000, Mr. Baker accepted a transfer from Colorado to Texas. His travel authorization contains a block labeled "Miscellaneous Expenses Allowance" and that block contains two boxes. One is labeled "Not Authorized." The second, which is checked, is labeled "Authorized In Amount Not To Exceed." Although the authorization estimates that Mr. Baker's miscellaneous expense allowance would be $700, the authorization does not say what dollar amount his allowance was "not to exceed." The travel orders also authorize the reimbursement of expenses related to the sale of a home at Mr. Baker's old duty station and the purchase of a home at his new duty station. The orders do not authorize the reimbursement of expenses related to settling an unexpired lease at Mr. Baker's old duty station.

Mr. Baker did not exercise the option to purchase the Pierson Way house. He says that he lost a $20,000 deposit and a $1550 damage deposit, among other amounts, when he transferred to Texas. After Mr. Baker transferred, GSA learned the details of his interest in the Pierson Way house and began to question whether it could reimburse Mr. Baker for certain expenses. GSA paid Mr. Baker a $700 miscellaneous expense allowance. GSA asks us for an advance decision concerning reimbursement of Mr. Baker's alleged $1500 security

deposit and the $15,600 that he allegedly paid for the option to purchase the house. GSA wants to know whether it can reimburse Mr. Baker for all or part of either of these amounts as a lease-breaking expense, or a residence transaction expense, or as part of the miscellaneous expense allowance.

Discussion

Before GSA decides whether to reimburse Mr. Baker for either his security deposit or his option payment, GSA needs to determine what he paid and what he forfeited. As we explained above, Mr. Baker provided proof that he paid his landlord a total of $10,500. It is not clear how Mr. Baker's landlord apportioned his payments among rent, a security deposit, and payment for the option to purchase. Mr. Baker says that his landlord retained a $20,000 "deposit," but the lease/option deposit receipt shows that the largest amount Mr. Baker was supposed to pay was $15,600 for an option to purchase. Mr. Baker also says that his landlord also retained a $1550 "damage deposit," but this was the amount that Mr. Baker paid for one month's rent and not the amount that he was supposed to pay for a security deposit. In responding to GSA's request for an advance decision, we will assume that Mr. Baker paid $15,600 for an option to purchase and $1500 for a security deposit, and that his landlord retained both of these amounts. Before GSA reimburses Mr. Baker, however, it needs to make sure that these assumptions are correct.

GSA might be able to reimburse Mr. Baker for the $1500 security deposit, but not the $15,600 that he paid for the option to purchase, as a lease-breaking expense.

The Federal Travel Regulation provides that expenses incurred by a transferred employee for settling an unexpired lease are reimbursable by the agency, provided certain requirements are met. One requirement is that the employee must have actually incurred the expenses. A second requirement is that the terms of the lease or applicable laws provide for payment of the settlement expenses. Another requirement is that the expenses cannot be avoided. 41 CFR 302-6.2(h) (2000). A forfeited security deposit can be reimbursed as a lease-breaking expense, but only if all of the regulation's requirements are met. Neil A. Friedman, GSBCA 15313-RELO, 00-2 BCA ¶ 31,006 (security deposit not reimbursable when landlord should have returned deposit in accordance with lease); Paul S. Sayah, GSBCA 14356-RELO, 98-1 BCA ¶ 29,595 (security deposit not reimbursable when forfeiture could have been avoided); Desmond A. Pridgen, GSBCA 14121-RELO, 97-2 BCA ¶ 29,146 (security deposit reimbursable when forfeited in accordance with terms of lease).

We looked first at the lease and found that it does not provide for the payment of any settlement expenses if Mr. Baker left before the end of the lease term. Although the regulation says only to look at the parties' lease and the lease says that it constitutes the complete agreement between the parties, we also reviewed the terms of the lease/option deposit receipt and the purchase option in order to see if they could help us respond to GSA. Like the lease, neither of these documents says that any settlement expenses would be due if Mr. Baker left before his lease expired. The deposit receipt provides that Mr. Baker's entire deposit was not refundable and would be retained if he did not tender the money needed to lease the house by February 1, 2000. The deposit receipt does not provide, however, that the deposit would be retained or that any settlement expenses would be due

if Mr. Baker left before his lease expired. The purchase option does not mention the security deposit. It says that the landlord would retain the money that Mr. Baker paid for the option if he recorded the option, if he failed to exercise the option, or if he defaulted on any of his obligations under the lease. The purchase option does not say that the landlord would retain the amount paid for the option in order to settle the terms of the lease if Mr. Baker left before the lease term expired. Based upon the information that GSA and Mr. Baker presented to us, neither the lease nor any other agreement between Mr. Baker and his landlord provides for forfeiture of the $1500 security deposit or the $15,600 that he paid for the option as an expense of settling an unexpired lease.

We next looked to see if applicable law provides for payment to Mr. Baker's landlord of either the option payment or the security deposit as an expense of settling an unexpired lease. We found no Colorado law providing that the landlord could retain the money that Mr. Baker paid for the option in order to settle an unexpired lease. The applicable law regarding the security deposit is found in a Colorado statute which provides that a landlord can retain a security deposit for nonpayment of rent, abandonment of the premises, nonpayment of utility charges, repair work, or cleaning contracted for by the tenant. A landlord cannot retain a security deposit to cover normal wear and tear. If actual cause exists for retaining any part of a security deposit, the landlord is required to provide the tenant with a written statement listing the exact reasons for the retention, and to refund the remainder of the deposit. Colorado's statute contains specific deadlines that a landlord must meet in order to retain all or part of a security deposit. Colo. Rev. Stat. Ann. § 38-12-103 (West 2000).

In order to determine whether Colorado state law provides for payment of Mr. Baker's $1500 security deposit as an expense of settling the unexpired lease, GSA needs to obtain from Mr. Baker evidence to show why he forfeited the security deposit. After GSA reviews the facts surrounding the landlord's retention of the deposit, it can determine whether applicable law provides for retention of the deposit as an expense of settling the unexpired lease and it can also determine whether the expense was avoidable. The written statement that the landlord should have provided to Mr. Baker concerning the retention of the deposit ought to provide GSA with the information it needs in order to determine why the deposit was forfeited.

In summary, GSA cannot reimburse Mr. Baker for the $15,600 that he paid for the option as an expense of settling an unexpired lease. Whether GSA can reimburse Mr. Baker for the $1500 security deposit as such an expense cannot be determined until Mr. Baker provides additional information to GSA. GSA needs to know why Mr. Baker's landlord retained the security deposit so that it can determine whether Colorado state law provides for payment of the security deposit as an expense of settling the unexpired lease and whether the expense was avoidable. If GSA determines that it can reimburse Mr. Baker for the security deposit as an expense of settling an unexpired lease, it may amend his travel orders accordingly.[1]

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[1] Generally, when an employee receives travel orders authorizing a particular allowance, an agency cannot modify the travel orders after the employee completes the travel so as to increase or to decrease the allowance. An exception to this general rule is made

GSA cannot reimburse Mr. Baker for the $1500 security deposit or the $15,600 that he paid for the option as an expense incurred in the sale of a residence.

The Federal Travel Regulation provides that when an agency transfers an employee from one permanent duty station to another, the agency shall reimburse the employee for expenses required to be paid "in connection with the sale of one residence at his/her old duty station." There are restrictions concerning the expenses that can be reimbursed and, as discussed below, requirements concerning the manner in which the employee must hold title to the residence. 41 CFR 302-6.1, 302-6.3. If no residence was sold, then there are no real estate transaction expenses to be reimbursed. Although there is nothing in the parties' submissions to us to show that the Pierson Way house was sold when Mr. Baker transferred to Texas, we will assume that a sale occurred.

In order for any real estate transaction expenses paid in connection with the sale to be reimbursable, Mr. Baker must have had either a legal title interest or an equitable title interest in the house in order to satisfy the requirements of the Federal Travel Regulation. 41 CFR 302-6.1(c)(3). Mr. Baker's landlord agreed to lease the Pierson Way house to Mr. Baker in exchange for monthly rent payments. He also sold Mr. Baker an option for $15,600, which gave Mr. Baker the right to purchase the seller's interest in the Pierson Way house for an agreed-upon amount within a specified time. As discussed below, Mr. Baker's lease with the accompanying option to purchase did not constitute either the legal title interest or the equitable title interest in the house needed to entitle him to be reimbursed for real estate transaction expenses.

Mr. Baker's lease with the accompanying option to purchase did not provide him with a legal title interest in the Pierson Way house. Mr. Baker could have obtained legal title by exercising the option within the time permitted, paying the agreed-upon price, and obtaining a deed to the house. If he had acquired legal title to the house, the $15,600 would have become part of his equity and, as such, would not have been a reimbursable real estate transaction expense if he had subsequently sold the house and failed to recover that amount. 41 CFR 302-6.2(e).

If Mr. Baker had entered into a land contract[2] instead of paying for an option to purchase, he would have acquired an equitable title interest in the property. By entering into a land contract, a purchaser obtains equitable title to the property that is the subject of the contract. This rule is based upon the legal doctrine of equitable conversion, which provides that a contract for the sale of real property converts the seller's interest into personalty and the purchaser's interest into realty. The basis for the doctrine is that there is a duty on the part of the seller to convey title to the purchaser and a duty on the part of the purchaser to make payments and to purchase the property. This duty exists in the case of a land contract

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when the facts clearly demonstrate that the travel orders contained an error. Alice P. Pfefferkorn, GSBCA 14124-TRAV, 97-2 BCA ¶ 29,313. Mr. Baker's orders clearly contain an error because they presume that he had a title interest in the Pierson Way house, and they can be amended to correct this error.

[2] A land contract is sometimes called a contract for deed or an installment contract.

because the purchaser agrees to make periodic payments to the seller in order to purchase the property and the seller agrees to convey legal title to the purchaser as soon as all of the payments are made.[3] In contrast to a purchaser who enters into a land contract, someone who holds an option to purchase property does not have equitable title to the property. The doctrine of equitable conversion does not apply because until the option is exercised, the option holder does not have a duty to purchase the property that is the subject of the option and the owner of the property has no duty to convey the property to the option holder.[4] Columbia Savings and Loan Assoc. v. Counce, 447 P.2d 977 (Colo. 1968); Chain O'Mines, Inc. v. Williamson, 72 P.2d 265 (Colo. 1937); Conn. Fire Ins. Co. v. Colorado Leasing, Mining & Milling Co., 116 P. 154 (Colo. 1911).

Mr. Baker's lease with the accompanying option to purchase did not give him an equitable title interest in the Pierson Way house. Mr. Baker paid $15,600 for the right to exercise an option and he did not agree to purchase the house. He did not agree to make periodic payments to purchase the property from the seller, and the seller did not agree to give legal title to Mr. Baker at any time in the future. The agreement that he entered into with his landlord expressly stated that it did not constitute a land contract. Because Mr. Baker did not obtain an equitable title interest in the house, neither the $1500 that he paid for a security deposit nor the $15,600 that he paid for his option could be reimbursed as an expense incurred in the sale of a residence, even if the Pierson Way house had been sold.

An attorney advised Mr. Baker that a land contract is similar to a lease with an option to purchase, and referred to the decision of the Supreme Court of Colorado in Rocky Mountain Gold Mines, Inc. v. Gold, Silver & Tungsten, Inc., 93 P.2d 973 (Colo. 1939). There, the parties entered into a lease with an option to purchase. The lease imposed significant duties, financial and otherwise, upon the tenant and provided that if the tenant made all of the payments required under the lease, the owner would convey title to the property to the tenant. The court held that the agreement between the parties should be construed as a sale of property and applied equitable principles in order to protect the tenant after it defaulted on the lease. In a later decision, the court explained that its reasoning in Rocky Mountain Gold Mines would not apply in the case of a conventional lease with option, which did not create mutual duties to make payments and to convey title. Strauss v. Boatright, 418 P.2d 878 (Colo. 1966). The Rocky Mountain Gold Mines decision does not establish that Mr. Baker had an equitable title interest in the Pierson Way house, because the terms of his agreement with his landlord were quite different from the terms of the agreement between the parties in that case.

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[3] A similar method of conveyance is a lease-purchase, in which the purchaser is obligated to lease the property and then purchase it, and the seller is obligated to convey legal title as soon as the purchase price is paid.

[4] The General Accounting Office, which decided claims such as Mr. Baker's until mid-1996, consistently decided that land contract purchasers held equitable title, but that lessors with options to purchase did not. Joseph F. Rinozzi, B-206852 (March 9, 1983); Peter D. Pendergast, B-204915 (Jan. 15, 1982); 57 Comp. Gen. 770 (1978); Marion B. Gamble, B-185095 (Aug. 13, 1976).

Mr. Baker's attorney correctly noted that Mr. Baker had some equitable interest in the Pierson Way house, for some purposes. For example, in Colorado, someone with an equitable claim can redeem property in the event of a foreclosure in order to prevent a transfer of title by a tax deed. A lease with an option to purchase can constitute an equitable claim for purposes of redemption. Notch Mountain Corp. v. Elliott, 898 P.2d 550 (Colo. 1995); Bean v. Westwood, 73 P.2d 386 (Colo. 1937). A tenant with an option to purchase can also have an equitable interest in property for the purpose of determining how to apply proceeds from insurance covering the property in the event of a loss. Jameson v. Foster, 646 P.2d 955 (Colo. 1982); Dolan v. Spencer, 21 P.2d 411 (Colo. 1933).

An equitable claim or interest, however, does not amount to an equitable title interest, and the regulation requires that Mr. Baker must have had an equitable title interest in the property in order to be reimbursed for any residence transaction expenses. Because Mr. Baker did not have an equitable title interest in the Pierson Way house, GSA cannot reimburse him for residence transaction expenses.

GSA cannot reimburse Mr. Baker for the $1500 security deposit, but might be able to reimburse him for part of the $15,600 that he paid for the option to purchase, as part of a miscellaneous expense allowance.

A miscellaneous expense allowance is paid to an employee in order to defray various costs associated with discontinuing residence at one location and establishing residence at a new location in connection with a permanent change of station. The allowance is related to expenses that are common to living quarters, furnishings, and household appliances, and to other types of expenses inherent in the relocation of a place of residence. 41 CFR 302-3.1.

Mr. Baker's travel authorization does not fix the amount of his miscellaneous expense allowance. Although the authorization estimates that Mr. Baker's miscellaneous expense allowance would be $700, the authorization does not say what dollar amount his allowance was "not to exceed." In order to determine the amount that Mr. Baker's allowance cannot exceed, we need to look at the governing statute and regulation.

Statute and regulation establish that Mr. Baker's miscellaneous expense allowance cannot exceed the equivalent of two weeks' basic pay, and might be limited to a lesser amount ($700). By statute, an employee who is otherwise eligible to be reimbursed for relocation expenses is entitled to an amount for miscellaneous expenses not to exceed two weeks' basic pay, if the employee has immediate family. 5 U.S.C. § 5724a(f) (Supp. IV 1998). The Federal Travel Regulation provides that the amount of the allowance that the agency "shall" pay to an eligible employee with immediate family is the lesser of $700 or the equivalent of two weeks' basic pay. The agency "may," however, authorize or approve[5] an allowance that does not exceed the equivalent of two weeks' basic pay without regard to

[5] Authorizations are given in advance of an event, while approvals are given after the fact. Charles Bonneville, B-131525 (July 17, 1957); 22 Comp. Gen. 895 (1943). Thus, according to the regulation, even if an agency authorizes a miscellaneous expense allowance of only $700, it can later approve an allowance equal to two weeks' basic pay.

the $700 limitation, if supported by acceptable statements of fact and either paid bills or other acceptable evidence justifying the amounts claimed. 41 CFR 302-3.3.

If GSA determines that there are acceptable statements of fact and either paid bills or other acceptable evidence, it can approve payment to Mr. Baker of an allowance that does not exceed the equivalent of two weeks' basic pay, without regard to the $700 limitation. If GSA makes these determinations, the entire miscellaneous expense allowance, including the $700 that he has already been paid, will have to be supported by appropriate evidence. 41 CFR 302-3.3(b); Laura A. Sacks, B-253485 (Oct. 7, 1993).

Even if GSA approves payment to Mr. Baker of a miscellaneous expense allowance that does not exceed the equivalent of two weeks' basic pay, it cannot reimburse Mr. Baker for the $1500 security deposit as part of that allowance. The regulations that authorize payment of the miscellaneous expense allowance explain that the allowance cannot be used to reimburse an employee for expenses that are disallowed elsewhere in the Federal Travel Regulation. 41 CFR 302-3.1(c). As discussed above, the security deposit is the type of expense that may be reimbursed as a lease-breaking expense if Mr. Baker can establish that applicable law provided for payment of the expense. If GSA determines that it can reimburse Mr. Baker for the deposit as a lease-breaking expense, then it cannot duplicate that payment by also reimbursing him for the deposit as part of the miscellaneous expense allowance. If GSA determines that it must disallow reimbursement of Mr. Baker's security deposit as a lease-breaking expense, then it cannot utilize the miscellaneous expense allowance to reimburse him for that deposit. 69 Comp. Gen. 506 (1990); Thomas A. Shaver, B-195851 (Oct. 29, 1980).

Assuming that GSA approves payment to Mr. Baker of a miscellaneous expense allowance that does not exceed the equivalent of two weeks' basic pay, it might be possible to reimburse part of the $15,600 that Mr. Baker paid and forfeited as part of that allowance. The Federal Travel Regulation explains that expenses cannot be reimbursed as part of the miscellaneous expense allowance if they were "brought about by circumstances, factors, or actions in which the move to a new duty station was not the proximate cause." 41 CFR 302-3.1(c). In Mr. Baker's case, this means that his transfer must have caused him to fail to exercise the option, and his failure to exercise the option must have brought about the forfeiture of the amount that he paid for the option.

In order to reimburse Mr. Baker for part of the $15,600, GSA will have to determine whether his transfer was the proximate cause of his failure to exercise the option, or whether some other event or factor was responsible for his failure to act. Mr. Baker needs to provide GSA with facts to establish why he did not exercise the option. The General Accounting Office, which settled claims for relocation expenses until that authority was transferred to the Board in mid-1996, provided guidance in two decisions that should prove useful to GSA in evaluating the information that Mr. Baker provides. In Lillian L. Beaton, B-207420 (Feb. 1, 1983), the Comptroller General decided that an employee could not recover the amount she paid for an option as part of the miscellaneous expense allowance. She had no legal obligation to exercise the option and purchase the optioned property and there was nothing in the record to show that she would have exercised the option if she had remained at her old duty station. The Comptroller General concluded that she had not established that her transfer was the predominant cause of her failure to exercise the option. In 64 Comp.

Gen. 323 (1985), the Comptroller General decided that the employee could recover the amount he paid for an option as part of the miscellaneous expense allowance. Although the employee had no legal obligation to exercise the option and purchase the optioned property, the Comptroller General was convinced that he would have done so if he had remained at his old duty station. The Comptroller General considered the reason the employee chose to use a lease with option to purchase, his ability to obtain more advantageous financing if he delayed purchasing the property, the circumstances surrounding his divorce, and his need to sell another house and use those funds in order to exercise the option. The Comptroller General concluded that the employee established that his transfer was the primary cause of his failure to exercise the option.

To date, Mr. Baker has not provided any information to establish that the transfer was the proximate cause of his failure to exercise his option to purchase the optioned property. As the Comptroller General decisions show, he will have to do something more than allege that the transfer was the primary cause of his failure to act. He will have to provide GSA with facts to show that the transfer directly and predominantly caused him not to exercise the option, and GSA will have to be assured that the failure to exercise the option was not caused by something else, such as a lack of financing.

If GSA determines that Mr. Baker's transfer was the proximate cause of his failure to exercise his option, then it needs to determine whether his failure to exercise the option brought about his forfeiture of the $15,600 that he paid for the option. The agreements between Mr. Baker and his landlord provided that he would forfeit the option if he failed to tender all funds necessary to lease the house by February 1, 2000, if he defaulted under any of the terms of his lease, if he recorded the option, or if he failed to exercise his option to purchase the property by November 30, 2000. We do not know why Mr. Baker's landlord kept the $15,600 deposit. In order for GSA to decide whether it can reimburse part of Mr. Baker's forfeited option payment as part of the miscellaneous expense allowance, Mr. Baker will have to establish that his forfeiture was brought about by his failure to exercise his option to purchase the Pierson Way house.

In summary, if GSA determines that there are acceptable statements of fact and either paid bills or other acceptable evidence, it can approve payment to Mr. Baker of a miscellaneous expense allowance that does not exceed the equivalent of two weeks' basic pay, without regard to the $700 limitation. GSA cannot reimburse Mr. Baker for a security deposit as part of that allowance. Whether GSA can reimburse Mr. Baker for part of the $15,600 he paid to purchase the option cannot be determined until Mr. Baker provides information to GSA showing that his transfer caused his failure to exercise the option, and that his failure to exercise the option brought about the forfeiture of the amount that he paid for the option.

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MARTHA H. DeGRAFF
Board Judge