UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: June 24, 2016

CBCA 4794

JOHN LEWINGER, AS RECEIVER FOR CORBAN ABQ V LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Ross L. Crown of Lewis Roca Rothberger Christie, LLP, Albuquerque, NM, counsel for Appellant.

Daniel J. McFeely, Office of General Counsel, Department of Veterans Affairs, Phoenix, AZ, counsel for Respondent.

Before Board Judges **GOODMAN**, **LESTER**, and **CHADWICK**.

**CHADWICK**, Board Judge.

John Lewinger, styling himself the receiver for Corban ABQ V LLC (Mr. Lewinger, the receiver, or appellant), appealed from a March 2015 decision of a contracting officer of the Department of Veterans Affairs (VA or respondent). The decision granted in part and denied in part a certified claim that Mr. Lewinger had submitted in his capacity as the court-appointed receiver of commercial real property at the corner of Centre Avenue and

International Avenue in Albuquerque, New Mexico.[1] Mr. Lewinger's claim sought rent and expenses allegedly owed by VA under a twenty-year lease that VA signed with Moreland Corporation (Moreland) for space in the building in 1994. The claim alleged that Corban ABQ V LLC (Corban) was a successor in interest to Baltz Family Partners, LTD (Baltz), which had judicially foreclosed on a mortgage secured by the Albuquerque building, and that Baltz had been, in turn, a successor to VA's original lessor, Moreland.

The respondent filed a motion to dismiss the appeal on the grounds that the appellant lacks standing, because neither he nor Corban is the "contractor" within the meaning of the Contract Disputes Act (CDA). Although we deny the respondent's motion, we do so without prejudice to revisiting our jurisdiction after the record is developed further, and we address some issues raised by the parties to an extent that may be useful as the appeal proceeds.

## Background

We summarize only the facts relevant to our jurisdiction. The parties do not dispute these facts, but disagree about the legal conclusions to be drawn from them and about the propriety of discovery.

VA and Moreland entered into lease 084B-027-94 in September 1994. The lease term was from September 1, 1995, through August 31, 2015. The lease was 160 pages long and required Moreland to provide services, such as operations support, maintenance, and cleaning, in addition to the leased space in Albuquerque. Respondent's Motion to Dismiss, Exhibit 1.[2]

On September 2, 2009, but effective as of January 1, 2000, Moreland "s[old], assign[ed], transfer[red] and set over" its rights in the VA lease to Williamsburg Limited Partnership (Williamsburg). Respondent's Exhibit 3 at 10. Also on September 2, 2009, and before the same notary, Williamsburg "s[old], assign[ed], transfer[red] and set over" its rights in the VA lease to Albuquerque Facility, LLC, effective as of August 28, 2009. *Id.* at 14. Moreland, Williamsburg, and Albuquerque Facility were all represented in these transactions by the same two people (the president of Moreland, who was also a manager of Albuquerque Facility, and the general partner of Williamsburg, Terry L. Moreland).

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[1] As discussed below, the Board may recaption this appeal, after consulting with the parties, to reflect the fact that the appellant is the receiver "of" the subject property, rather than "for" the foreclosure plaintiff.

[2] All citations of respondent's exhibits refer to those attached to the motion.

In May 2010, Albuquerque Facility assigned its rights in the VA lease to Baltz, a lender, to obtain a mortgage on the building occupied by the VA. Although made for the purpose of obtaining a loan, this purported assignment was not limited to the rent payable under the VA lease, but was written as a complete assignment of the lease, with a revocable "license back" to Albuquerque Facility of the right to collect rent "and otherwise act as the landlord under the Lease[]." Respondent's Exhibit 3 at 18-19.

In October 2012, Baltz filed a complaint in a State of New Mexico court, alleging that Albuquerque Facility was in default of its mortgage obligations, and requesting the appointment of a receiver to collect current and back rent and otherwise to protect Baltz's interest in the mortgaged property. Baltz's complaint named Terry L. Moreland and Peggy J. Moreland as defendants in addition to Albuquerque Facility. Moreland was not named as a defendant at this time. Respondent's Exhibit 5.

The court appointed Mr. Lewinger receiver of the mortgaged property in January 2013. *Baltz Family Partners, LTD v. Albuquerque Facility*, *LLC*, No. D-202-CV-2012-09824 (N.M. 2d Dist. Jan. 3, 2013). The appointment order authorized the receiver to, among other things, "collect the rents and other income produced by the Receivership Estate," "enter into leases and other contracts reasonably necessary to operate, maintain and preserve the [R]eceivership [E]state," and "bring and defend actions in his capacity as Receiver to maintain and preserve the Receivership Estate." Respondent's Exhibit 6.

The record reflects that throughout the above period (i.e., the first seventeen-plus years of the lease), VA communicated with Moreland about matters arising under the lease day to day, paid rent to Moreland, and otherwise recognized Moreland as its lessor.

In March 2013, after receiving the order appointing Mr. Lewinger as receiver in *Baltz v. Albuquerque Facility*, a VA contracting officer advised Moreland in writing that VA would suspend its rent payments. The contracting officer wrote that, while VA "believe[d] that the Court Order address[ed] the rents payable under lease number 084B-027-94," which was between VA and Moreland, "since the Court order only addresses Albuquerque Facility, it is unclear that [it] does in fact cover rents payable to Moreland Corporation." The contracting officer promised that, after "this matter [wa]s clarified," VA would "resume both back payments and future payments to the appropriate party, whether it is Moreland Corporation, the Receiver, or [an]other proper party." Respondent's Exhibit 7.

As noted below, it appears from the record (and VA has asserted on information and belief) that yet another entity, Biomedical Research Institute of New Mexico, bought the building in a court-ordered short sale in July 2013.

In November 2013, VA (through a Director, Real Property Service), Moreland, Williamsburg, and Albuquerque Facility entered into an agreement and general release effective as of August 23, 2013. VA agreed to pay the receiver the back rent due under lease 084B-027-94 for January 30, 2013, to July 27, 2013. In exchange, the other parties agreed to release VA from claims under the lease. Respondent's Exhibit 8. The recitals of this four-party agreement stated that the transfers of rights in the VA lease from Moreland to Williamsburg and from Williamsburg to Albuquerque Facility "occurred without VA's prior approval." *Id.* at 2. The November 2013 agreement did not mention an assignment of the lease to Baltz, although it mentioned the July 2013 sale of the property to Biomedical Research Institute of New Mexico. *Id.*

VA made the promised rent payment to the receiver in January 2014. In the purchase order for the payment, the contracting officer (who would later decide the receiver's claim) included the explanation:

> In January 2013 the Department of Veterans Affairs received a court order from the State of New Mexico to stop payments to Moreland Corporation, and to start paying New Mexico Real Estate Advisors, dba Colliers International [the receiver's firm]. Release Agreement has been signed by Moreland Corporation and the Department of Veterans Affairs.

Respondent's Exhibit 9.

In March 2014, the New Mexico court issued an order modifying its January 2013 order appointing the receiver. The March 2014 order named Corban, in the caption, as the "successor in interest to" the Baltz partnership. (The caption also reflected the addition of Moreland, Williamsburg, and a paving company as defendants.) This order authorized the receiver to, among other things, "pursue the remaining amounts due under the leases with the Veterans Administration and Biomedical Research Institute of New Mexico, both pre- and post-receivership." *Corban ABQ V LLC v. Albuquerque Facility, LLC*, No. D-202-CV-2012-09824 (N.M. 2d Dist. Mar. 26, 2014). The record before us does not reveal how, or exactly when, Corban succeeded to Baltz's interest in the case. The receiver has stated only that "an interest in the Receivership Estate was acquired by Corban ABQ V." Appellant's Opposition to Respondent's Motion to Dismiss at 12.

In August 2014, the receiver submitted a certified claim to VA for an unpaid balance of $234,490.86 under the lease. In February 2015, after discussions with VA about the calculations, the receiver submitted a revised certified claim for $179,836.98 in rent and operating expenses for September 1, 1996, through July 25, 2013. Mr. Lewinger identified himself in both certified claims as "the court appointed *receiver for Corban* . . . , as successor

in interest to Baltz . . . (the 'Contractor')[,] the successor to Moreland . . . and lessor under the Lease." Respondent's Exhibit 10 at 1; Respondent's Exhibit 13 at 1 (emphasis added).

In March 2015, the contracting officer granted the revised claim as to $77,587.57 and denied it as to the remainder, $102,249.41. Of potential significance, in her decision, the contracting officer repeatedly characterized the claim as one by Mr. Lewinger's real estate firm, Colliers International. *See, e.g.*, Notice of Appeal, Exhibit 1, at 1 ("Colliers International has stated that it is owed . . . $179,836.98 . . . ."). The decision did not mention Corban, Baltz, or any other party that had asserted an interest in the lease after Moreland. In her conclusion, immediately before the statement of appeal rights, the contracting officer wrote, "PO [purchase order] 501CF4196 has been established to pay a total of $77,587.57. Please submit an invoice against PO 501CF4196 . . . to receive payment." *Id.* at 4.

The receiver timely appealed, and the respondent promptly moved to dismiss the appeal for lack of jurisdiction.

## Discussion

### I. Significance of the Anti-Assignment Statutes

The Board's jurisdiction derives from the CDA, 41 U.S.C. §§ 7101-7109 (2012). "[T]he strict limits of the CDA" constitute "jurisdictional prerequisites to any appeal." *England v. Swanson Group, Inc*., 353 F.3d 1375, 1379 (Fed. Cir. 2004).

VA argues that the receiver lacks standing to bring this appeal because neither he nor Corban, the beneficiary in whose name he filed the appeal, is a "contractor" as defined by the CDA, 41 U.S.C. §§ 7101(7), 7104(a), with respect to the VA lease. As the proponent of the Board's jurisdiction, the appellant bears the burden of proof on this issue even though he is the non-movant. *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988). The receiver must show that he was in privity of contract with VA when the appeal was filed (or was validly acting for a party in privity), and more specifically, that each assignment in the chain of transfers from Moreland to the receiver either was valid when made, or was subsequently recognized as valid by VA. *See Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652, 13 BCA ¶ 35,370. In ruling on VA's motion, we may weigh evidence to resolve disputes of fact. *Rockies Express Pipeline LLC v. Department of the Interior*, CBCA 1821, 10-2 BCA ¶ 34,542.

VA argues that the receiver lacks standing because each of the assignments of the lease was invalid under the Anti-Assignment Act, 41 U.S.C. § 6305(a), and the Assignment of Claims Act, 31 U.S.C. § 3727. As explained in *Summit Commerce Pointe*,

> The[se two] statutes serve the purpose of preventing individuals or companies from accumulating claims against the Government and of thereby requiring the Government to deal with persons or concerns other than the party the Government agreed to deal with. *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980). Despite the bar created by these statutes, it has been held that the Government may recognize an assignment as valid, either directly or constructively, through its actions. The most direct recognition is through a novation agreement by which the Government expressly agrees to the substitution of another party to its contract. Constructive waivers of the Anti-Assignment Acts depend on the individual circumstances of each case. . . . The case law establishes that the waiver of the Anti-Assignment Acts must be clear. . . . Without both knowledge and assent there can be no waiver of the protections of the statutes. *Insurance Co. of the West v. United States*, 100 Fed. Cl. 58 (2011).

13 BCA at 173,569.

Not every assignment is subject to these restrictions. The statutes expressly exclude one-time assignments of rights to payment (but not of performance-based contract claims) to "financing institutions" if certain notice requirements are met. 31 U.S.C. § 3727(c); 41 U.S.C. § 6305(b). In addition, "[o]ver time, the courts, sensitive to the purposes of the statutes, exempted from their broad reach certain assignments when it was concluded [an] assignment did not present the danger[s] the statutes were designed to obviate." *Tuftco*, 614 F.2d at 744-45; *see Keydata Corp. v. United States*, 504 F.2d 1115, 1118 (Ct. Cl. 1974); *Broadlake Partners*, GSBCA 10713, 92-1 BCA ¶ 24,699 (1991). Assignments of pure ground leases that do not require the lessor to provide any services, for example, are exempt on the basis that such leases, while "'contract[s]' in the broadest sense of that word," are not "of the class of contracts the transfer of which, or of any interest therein, is prohibited by [law]." *Freedman's Saving & Trust Co. v. Shepherd*, 127 U.S. 494, 505 (1888)*, cited in Summit Commerce Pointe*, 13 BCA at 173,569.

More broadly, assignments occurring by operation of law do not implicate the acts. *See Seaboard Air Line Railway v. United States*, 256 U.S. 655, 657 (1921). This category includes corporate restructurings, mergers, and name changes "where in essence the contract continues with the same entity, but in a different form." *Westinghouse Electric Co. v. United States*, 56 Fed. Cl. 564, 569 (2003). A court-ordered transfer of a contractor's assets to a receiver, as in bankruptcy, also occurs "by operation of law" and does not require the Government's consent. *See Goodman v. Niback*, 102 U.S. 556 (1880); *Redfield v. United States*, 27 Ct. Cl. 393 (1892). This exception applies, however, only when a "general

receiver" acts for the contractor for all purposes and for the benefit of all of its creditors. *Patterson v. United States*, 354 F.2d 327, 330 (Ct. Cl. 1965); *George Howes & Co. v. United States*, 24 Ct. Cl. 170, 183 (1889) ("[T]he courts recognize as exceptions . . . only those assignments made necessary by the actual death of the creditor, those provided for under general laws in case of his civil death as to all his estate by proceedings in bankruptcy, and those, in analogy to the latter, made by voluntary transfer of all his property for the benefit of all his creditors."). Both the Court of Claims and at least one of our predecessor boards held that the anti-assignment acts specifically target the situation in which a "limited receiver" asserts a claim on behalf of one creditor of the original contractor. *Patterson*, 354 F.2d at 330; *Hood Lumber Co.*, AGBCA 98-156-1, 99-2 BCA ¶ 30,560, at 150,926.

II. Analysis Under the Anti-Assignment Statutes

With these principles in mind, we have enough information to resolve some issues related to standing, but not others. Preliminarily, this appeal may not be properly captioned. As VA points out, under New Mexico law and the court's orders, Mr. Lewinger is not a "general receiver," but a "special receiver with control over only the [mortgaged] property." *First Interstate Bank v. Heritage Square*, 833 P.2d 240, 243 (N.M. 1992). Mr. Lewinger was not appointed a receiver "for Corban," as stated in his certified claim and notice of appeal, but "of" the property at Centre and International Avenues in Albuquerque. He had authority to file this appeal not "for" a party before the state court, but "in his capacity as Receiver to maintain and preserve the Receivership Estate," per the court's January 2013 order, as clarified in March 2014. *See Black's Law Dictionary* 1383 (9th ed. 2009) ("receiver" is "[a] disinterested person appointed by a court . . . for the protection or collection of property that is the subject of diverse claims"); *Kaufman v. Duncan Investors, L.P.*, 368 N.J. Super. 501, 506 (App. Div. 2004) (similar). This nuance affects our analysis of both the statutory and waiver issues raised by VA's motion.

We have found no binding precedent or persuasive authority bearing on whether a special receiver of real property in foreclosure may ordinarily enforce leases "by operation of law" without the Government's assent—that is, whether Mr. Lewinger is more like the general receiver in *Goodman* or the limited receiver in *Patterson*. Neither party cites authority directly on point.[3] On one hand, a foreclosure receivership is created and overseen by a court in a legal proceeding, suggesting that the receivership arises by operation of law. *See, e.g.*, *Keydata*, 504 F.2d at 1119 ("The first significant fact about the assignment of Wyman's claim against the Government . . . is, of course, that it was done under order of the

[3] *Freedman's Saving & Trust* involved a foreclosure receivership, but the holding in that case depended on the nature of the leasehold, as we discuss below.

Superior Court of Massachusetts, as a result of an adversary proceeding."). On the other hand, the terms of a foreclosure receivership are governed by the preexisting mortgage agreement, *see First Interstate Bank*, 833 P.2d at 243, and the anti-assignment acts require that assignments to financing institutions preclude the interest from being reassigned. 31 U.S.C. § 3727(c)(3); 41 U.S.C. § 6305(b)(5). This may suggest that the statutes reserve the Government's right to object to a lessor's including language in its mortgage agreement that would require the Government to deal with a special receiver in the event of a foreclosure.

We decline to decide at this time whether, assuming all of the preceding assignments here were valid, a special receivership of real property in foreclosure in New Mexico falls within the automatic *Goodman* exception for assignments to a receiver by operation of law. As discussed below, this legal issue appears to be moot in this case.

In a related argument, the receiver urges us to find that he has standing to bring the appeal on the ground that his role here does not implicate the policy concerns of the anti-assignment statutes. He argues that VA faces no risk of fraud or multiple litigation because the New Mexico court "has appointed the Receiver as the sole person authorized to collect the rents and other income produced by the Receivership Estate (which includes the Lease) and [to] bring and defend actions to maintain and preserve the Receivership estate," and that it is "immaterial to the VA how the New Mexico court ultimately distributes" any money he may recover. Appellant's Opposition at 9, 12.

We have no evidence before us, however, that the state court recognized Mr. Lewinger as the "sole person" able to bring a claim against VA for rent and expenses under the twenty-year lease. His role as we understand it is to protect the foreclosure estate by enforcing to the best of his ability whatever lease rights the mortgagor, Albuquerque Facility, actually possessed and conveyed to its lender, Baltz. In appointing the special receiver, the court did not rule, so far as we have been shown, that every assignment in the chain leading from Moreland to Baltz (or to Corban) was valid. The receiver must take the VA lease as he found it in the estate in 2013. To the extent that events prior to his receivership raise concerns about the status of the lease under the anti-assignment statutes, the provisions of his special receivership do not automatically cure those concerns, which are not immaterial.

It is true that, after receiving notice of the court-ordered receivership, VA obtained general releases of claims under the lease from Moreland, Williamsburg, and Albuquerque Facility, so that it could safely pay overdue rent to the receiver. The receiver argues that this is further evidence that VA faces no risk of competing claims in litigation. We see it, instead, as evidence of exactly that risk. VA presumably gave up some consideration for the releases, and at a minimum, it had to negotiate with multiple potential landlords, a result the anti-assignment statutes seek to avoid. (In addition, VA has no release from Baltz or the

entity that purchased the building in July 2013.) The court in *American Government Properties v. United States*, 118 Fed. Cl. 61, 68 (2014) (*AGP*), held that a lessor could not cure an invalid assignment by dissolving the transferee (which it controlled) and effecting a reassignment of the lease to the original contractor by operation of law. We see no reason to hold that VA could do here what a contractor could not do, i.e., cure unlawful assignments by eliminating the risk of competing claims on its own initiative.

This is important because we find that, *unless* the receiver can establish that the contracting officer waived all of the defects in the chain of assignments in her interactions with him, the assignments by Moreland to Williamsburg, by Williamsburg to Albuquerque Facility, and by Albuquerque Facility to Baltz all violated the anti-assignment acts, and were ineffective. It is primarily our inability to resolve the waiver issue at this time that causes us to deny VA's motion.

VA says it did not know of or approve any of the assignments up to and including the assignment to Baltz in May 2010. The release agreement among VA, Moreland, Williamsburg, and Albuquerque Facility recited that VA did not agree to the first two assignments, in September 2009. We have no evidence casting doubt on that recital. The receiver argues that because Moreland, Williamsburg, and Albuquerque Facility were represented in the September 2009 transactions by the same two people, those assignments fell within the exception for interorganizational assignments by operation of law. We disagree. The 2009 transactions plainly purported to pass rights between separate legal entities. *See AGP*, 118 Fed. Cl. at 68. Indeed, as VA notes, Moreland, Williamsburg, and Albuquerque Facility were later named separately as defendants in the foreclosure lawsuit. The 2009 assignments were ineffective unless the receiver can demonstrate a waiver.

The receiver contends that Albuquerque Facility's subsequent assignment to Baltz, as well as his own acquisition of an interest in the lease, did not implicate the anti-assignment statutes under the *Freedman's Saving & Trust* principle, because Baltz and the receiver were assigned only the rent and were not obliged to provide any services to VA. *See Summit Commerce Pointe*, 13 BCA at 173,569 (citing *Freedman's Saving & Trust*, 127 U.S. at 504-05). We have held categorically, however, that *Freedman's Saving & Trust* "does not apply to the contemporary lease (like the one before us) involving a host of services and supplies to be furnished by the lessor." *Id.* (citing *Broadlake Partners*, 92-1 BCA ¶ 24,699). Moreover, the assignment from Albuquerque Facility to Baltz purported to be a complete assignment of the VA lease, with a "license back," not an assignment of the rent alone. Although Baltz was a "financing institution" for Albuquerque Facility, the receiver has not shown that the assignment to Baltz was of the kind permitted by the anti-assignment statutes, or that anyone provided written notice to VA of the assignment.

Therefore, on the record before us, the assignments by Moreland to Williamsburg, by Williamsburg to Albuquerque Facility, and by Albuquerque Facility to Baltz all appear void with respect to VA, unless VA waived the statutory requirements. *See Banco Bilbao Vizcaya–Puerto Rico v. United States*, 48 Fed. Cl. 29, 33 (2000). If VA recognized the receiver as its effective lessor, then it waived any defects in the assignments leading to the receivership. If VA did not do so, then the receiver could acquire no rights to assert against VA under the lease, because the lease was invalidly assigned several times before he was appointed. *E.g.*, *Kingsbury v. United States*, 563 F.2d 1019, 1026 (Ct. Cl. 1977) ("In sum, the assignment on which plaintiff sues is void under the Anti-Assignment Act . . . .").[4]

III. Possible Validity of the Assignments Based Upon Waiver

We now reach the core issue of waiver, which "depend[s] on the individual [and unusual] circumstances of [this] case," although VA's intent to give up the protections of the anti-assignment statutes "must be clear." *Summit Commerce Pointe*, 13 BCA at 173,569; *see also Tuftco*, 614 F.2d at 745 ("[I]t is unclear precisely what actions by the Government will constitute recognition."). It bears repeating that the appellant is the receiver alone. The question for present purposes is whether VA clearly agreed to treat the receiver as its contractor. As the receiver notes, courts have found waivers where the agency learned of the assignment, modified the contract accordingly, and paid the assignee. *See D&H Distributing Co. v. United States*, 102 F.3d 542, 546 (Fed. Cir. 1996); *Tuftco*, 614 F.2d at 746 ("It is unnecessary to identify any one particular act as constituting recognition of the assignments by the Government. It is enough to say that the totality of the circumstances presented to the court establishes the Government's recognition of the assignments by its knowledge, assent, and action consistent with the terms of the assignments."); *Rivera Finance of Texas, Inc. v. United States*, 58 Fed. Cl. 528, 531-32 (2003). The contracting officer here paid the suspended rent to the receiver, decided (and granted in part) a certified claim submitted by him, and set up a purchase order to make a payment on the claim. These actions could suggest a waiver. VA argues that we cannot give independent significance to the contracting officer's decision because our review is de novo. *See Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc). We agree, but that is not what we are doing. The contracting officer's actions on the claim are relevant as part of her course of conduct.

But at this point we do not know how to interpret the contracting officer's actions. For one thing, the claim she *stated* she partially granted was one by "Colliers International,"

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[4] Because the receiver, not Corban, is the appellant, we leave for possible development in discovery whether Baltz purported to assign the lease to Corban during the receivership, and what effect, if any, this might have on the receiver's standing here.

an entity that is not before us. For another, it is unclear whether or to what extent she accepted the court's orders, and the receiver's statements about them, at face value. Presented with the order appointing the receiver, the contracting officer stopped the rent payments to Moreland and took steps to pay rent to a "proper party." We do not know whether she thought she had a choice. Her notation on the January 2014 purchase order suggested she did not. The receiver then advised VA in certified claims, subject to the penalties for false statements to the Government, that he was acting "for" a successor to "the Contractor." As we have noted, this was not entirely accurate (as the receiver represents the estate), but the court's orders may have seemed, on their face, to confirm it. The record so far does not show that the contracting officer was ever asked to agree to an assignment to the receiver (or to Baltz or Corban, the plaintiffs). She may have thought such a transfer had already occurred by order of the court; she may have thought VA should pay the receiver on a provisional basis; or she may have intended to accept the receiver as VA's lessor despite the potential statutory barriers. Maybe something else happened. We cannot tell.[5]

As in any contracting situation, the question is how the parties should reasonably have understood each other. *See D&H Distributing*, 102 F.3d at 546. The circumstances are sufficiently ambiguous here that we cannot answer the question without more evidence.

The receiver has asked us to suspend ruling on VA's motion, require the submission of an appeal file, and permit discovery, should we conclude that he "failed to demonstrate that the Motion to Dismiss should be denied," arguing that VA "likely [has] a wealth of additional evidence supporting the Receiver's right to bring this appeal." Appellant's Opposition at 17. VA countered that allowing the appeal to proceed would "reward[]" the receiver for "lack of diligence" by "allow[ing him] to engage in a fishing expedition in VA records [that] Appellant has no right to access." Respondent's Reply at 17.

We recognize that "[o]nce sufficient facts are presented to bring into question the jurisdiction of the Board to hear the dispute, it is incumbent upon appellant to come forward with evidence establishing jurisdiction." *Omni Pinnacle, L.L.C. v. Department of Agriculture*, CBCA 2452, 14-1 BCA ¶ 35,538, at 174,160; *see also Monster Government*

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[5] We specifically reject the receiver's argument that VA retroactively approved the assignments from Moreland to Williamsburg and from Williamsburg to Albuquerque Facility simply by entering into the release agreement with those parties in November 2013. The evident purpose of that agreement was to clear the way for VA to pay the suspended rent to the receiver. The agreement alone is not clear evidence of VA's intent to waive the anti-assignment statutes. It is potentially significant only as part of VA's overall conduct in arranging to deal with the receiver.

*Solutions, Inc. v. Department of Homeland Security*, DOT BCA 4532, 06-2 BCA ¶ 33,312, at 165,155 ("When jurisdiction is lacking, we cannot proceed to decide a case. Our only function is to announce the lack of jurisdiction and dismiss the case.") (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)). We do not lightly allow an appeal to proceed when our jurisdiction is in doubt. Nor do we wish to encourage satellite litigation over jurisdiction. In this case, however, the threshold jurisdictional arguments need factual development. *See, e.g.*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 721 (2014); *Brewer v. SmithKline Beacham Corp*., 774 F. Supp. 2d 720, 729-31 (E.D. Pa. 2011) (describing discovery regarding diversity jurisdiction).

We trust that the parties can conduct the appeal efficiently, guided by this decision. The complaint and appeal file shall be due within thirty calendar days of the date of this decision. Within fourteen calendar days after the answer is filed, the parties shall jointly propose a date for a status conference regarding further proceedings.

Decision

In accordance with the discussion above, respondent's motion to dismiss is **DENIED**.

KYLE CHADWICK
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

HAROLD D. LESTER, JR.
Board Judge