DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-214679 DATE: April 29, 1985

MATTER OF: Greenstreet Farms, Inc.

DIGEST: 1. Debtor may contractually agree to procedures different from those specified in 31 U.S.C. § 3716(a), or may completely waive entitlement to those procedures, as long as the variance or waiver is made voluntarily, knowingly, and intelligently.

2. Unless parties expressly agree to the contrary, a creditor's acceptance of a work-out agreement from the debtor does not discharge the pre-existing debt, unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the work-out agreement had not existed, and may use offset to collect the entire pre-existing debt, not just the installments that were past due under the work-out agreement.

The Soil Conservation Service (SCS) of the Department of Agriculture has requested our decision on two questions concerning the impact of section 10 of the Debt Collection Act of 1982, 31 U.S.C. § 3716 (1982), on the authority of the United States to take administrative offset.

The first question concerns the need to promulgate regulations prior to taking administrative offset. The second question concerns offsets taken under contractual agreements which provide for offset after completion of specified due process-styled procedures which differ from those contained in section 10. As is explained below, we conclude that the procedures in section 10 do not apply to this case, and therefore it is not necessary for us to answer the first question at this time. Instead, we find that the debt at issue here is governed by contractual agreements which provided the substantial equivalent of the section 10 procedures. Upon completion of those procedures, and the valid waiver of any further rights under them, SCS was authorized to collect the full amount of the debt.

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FACTS

On June 17, 1977, SCS entered into a contract (No. AG48SCS04589) with Greenstreet Farms, Inc. pursuant to the Great Plains Conservation Program, as authorized by 16 U.S.C. § 590p(b), and implemented by 7 C.F.R. pt. 631 (1977). Under the contract, and in accordance with the implementing regulations, Greenstreet Farms agreed to take certain measures intended to properly conserve, develop, and utilize the soil and water resources of property it owned, in return for which SCS agreed to finance those measures. The contract specifically provided that Greenstreet Farms:

> "* * * agrees to all of the regulations issued by the Secretary of Agriculture governing the [Great Plains Conservation] program, which regulations are hereby made a part of this contract [and] to forfeit all rights to further payments or grants under the contract and refund to the United States all payments or grants received thereunder upon [its] violation of the contract * * *."

The implementing regulations which were incorporated by reference into the contract specified the procedures to be followed by SCS when determining whether the contract had been violated, including detailed requirements for notice and an opportunity for hearing on the issue of whether a violation had occurred, as well as procedures for administratively appealing the agency's initial decision. 7 C.F.R. § 631.25. The regulations also provided that if a farm accused of violating a contract admits to the violation and agrees in writing to accept a forfeiture, refund, payment adjustment, or termination of the contract, then "no further [due process-styled] proceedings shall be undertaken." 7 C.F.R. § 631.25(a). Finally, the implementing regulations authorized the taking of administrative setoffs against amounts payable under the program in order to recover any indebtedness owed to any agency of the United States. 7 C.F.R. § 631.29.

According to SCS, the contract was modified on several occasions to afford Greenstreet Farms additional time to carry out the specified measures. However, on November 24, 1981, SCS advised Greenstreet Farms in writing that the contract could not be modified again and that, if Greenstreet failed to take the agreed upon measures by June 1, 1982, it would be considered to have violated the contract. On July 22, 1982, SCS advised Greenstreet Farms in writing that

it believed that the contract had been violated. Subsequently, on October 1, 1982, Greenstreet Farms signed a document entitled "Agreement Covering Non-Compliance with Provisions of Contract [under the] Great Plains Conservation Program." This non-compliance agreement stipulated that Greenstreet Farms had failed to carry out certain provisions of the contract; that the nature and effect of that non-compliance warranted termination of the contract; that Greenstreet Farms thereby forfeited all rights to further payments under the contract; and that Greenstreet Farms should refund $4,493.20 to SCS for payments that it had previously received under the contract. The non-compliance agreement concluded with the statement that Greenstreet Farms:

> "* * * agrees that [the] forfeiture or refund * * * is proper and any amounts in connection therewith * * * are due and owing. [Greenstreet Farms] waives the right to any further proceedings under the regulations governing contract violations."

A notation on the non-compliance agreement indicated that Greenstreet Farms sought permission to pay back the agreed refund by means of a 3-year installment work-out agreement with the first payment due on August 1, 1983. On October 14, 1982, SCS sent a letter to Greenstreet Farms agreeing to the installment proposal. However, SCS stated that such an arrangement would require the assessment of "late charges" on any payment that might become past due.

A year later, on August 11, 1983, when Greenstreet Farms failed to make its first installment payment, SCS wrote Greenstreet Farms to request a payment of the past due principal, plus interest. SCS warned Greenstreet Farms that if the past due amount was not received by December 1, efforts would be taken to collect the amounts owed through administrative offset, or any other means available to the agency. On September 28, 1983, when payment still was not received, SCS sent another letter to Greenstreet Farms to advise it that, in view of Greenstreet Farms' failure to make payment as agreed, "the [work-out] agreement is now void." Therefore, SCS demanded payment of the entire debt, plus interest. SCS also stated that action had been taken to begin collection by means of administrative offset.

On December 20, 1983, administrative offset was effected against a $2,126.15 payment owed to Greenstreet Farms by the Commodity Credit Corporation under the Feed

Grain, Rice, Upland Cotton, and Wheat Programs for Crop Years 1982-1985. In order to participate in those programs, Greenstreet Farms had filed a form ASCS-477, "Intention to Participate and Application for Payment." On that form, Greenstreet Farms agreed "[t]o comply with the regulations governing the applicable program and payment limitations," which may be found in 7 C.F.R. pt. 713. Those regulations specifically authorize the use of administrative offset against payments to be made under those programs in order to collect any debts owed to any agency of the United States Government. 7 C.F.R. § 713.113. Those regulations also set out the procedures to be followed in order to obtain reconsideration and review of the agency's actions. 7 C.F.R. § 713.114.

At no time since it breached the original contract and the work-out agreement has Greenstreet Farms ever attempted to dispute its debt or invoke the due process-styled procedures in any of the relevant regulations. However, Greenstreet Farms did write to SCS to protest the offset. Although it still did not dispute the amount or validity of its debt, or the fact that payment was past due, Greenstreet Farms explained that adverse weather conditions had prevented it from earning the funds necessary to make the first installment payment. Greenstreet Farms requested that SCS return the offset funds and agree to enter into a new repayment plan, to begin in August 1984. Greenstreet Farms also asserted that the SCS offset activities were illegal on several grounds, including the failure to promulgate regulations under section 10 of the Debt Collection Act of 1982 prior to taking administrative offset; the assessment of interest on the debt without Greenstreet Farms' agreement; the absence of authority to "accelerate" its debt (as opposed to collecting only the past due installment payments); and the failure to properly serve Greenstreet Farms with legal "notice" prior to the taking of offset.

In view of these facts and the assertions of Greenstreet Farms, SCS seeks our answers to two questions:

> "1. Does the Debt Collection Act of 1982 preclude the SCS from the use of administrative setoff until agency regulations have been promulgated to implement the act?
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> "2. If SCS is not precluded from the use of administrative offset pending promulgation of rules, in your opinion, will SCS have provided [Greenstreet Farms] due process after

response to its January 17, 1984, letter has been made, or do you feel that something additional should be done?"

DISCUSSION

Because we think the Greenstreet Farms debt is governed by the provisions of its contractual agreements with SCS (and the regulations incorporated by reference therein), we need not answer the first question posed by SCS at this time. For this reason, we proceed directly to the second question. In order to answer that question, we must first determine what procedures, if any, are applicable to this case; second, whether SCS complied with these procedures; and finally, if all else was proper, whether SCS could take offset to collect the full amount of Greenstreet Farms' debt.

1. The applicable procedures

Greenstreet Farms has suggested that, regardless of the procedures set out in the contract and incorporated regulations, before it may take offset, SCS is required to follow the procedures set forth in section 10 of the Debt Collection Act of 1982 (DCA). The DCA amended the Federal Claims Collection Act of 1966. Both acts have been codified in title 31 of the U.S. Code, chapter 37. According to its legislative history, the DCA was intended to "put some teeth into Federal [debt] collection efforts" by giving the Government "the tools it needs to collect these debts, while safeguarding the legitimate rights of privacy and due process of debtors." 128 Cong. Rec. S12328 (daily ed. Sept. 27, 1982) (statement of Sen. Percy). Section 10 of the DCA provides that agencies may collect claims owed to the United States by means of administrative offset, after the debtor has been accorded certain procedural rights. 31 U.S.C. § 3716(a).

In the absence of particular statutory[1]/ or contractual provisions authorizing offset and specifying the procedures to be followed, we would agree that an agency is required to follow the procedural provisions of section 10, as implemented in section 102.3 of the Federal Claims Collection Standards (FCCS), as amended, 49 Fed. Reg. 8889 (1984). B-215128, Dec. 14, 1984, 64 Comp. Gen. ____. The procedures prescribed by section 10 are mandatory and, in our view, apply to already outstanding debts, as well as to debts arising after enactment of the DCA.

In this case, however, there were contractual provisions which, together with the regulations incorporated therein, authorized offset and specified the procedures to be followed. For the reasons given below, we find that these procedures, rather than those prescribed by section 10, govern collection of the Greenstreet Farms debt.

In essence, Greenstreet Farms is arguing that, rather than follow the contractual agreements which it entered into before the enactment of the DCA, section 10 of that act should be applied "retrospectively" to govern the collection of its debt. The traditional view has been that statutes are to be given prospective application absent clear indication to the contrary. However, in Bradley v. School Board, 416 U.S. 696, 711, 715 (1974), the Supreme Court established that "a court is to apply the law in effect at the time it renders its decision [i.e., retrospectively], unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

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[1]/ Section 10 specifically provides that it shall not apply "when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved." 31 U.S.C. § 3716(c)(2) (emphasis added). With this in mind, we note that 16 U.S.C. § 590p(b)(v) requires farmers who participate in the Great Plains Conservation Program to enter into contractual agreements containing "such additional provisions as the Secretary [of Agriculture] determines are desirable * * * to effectuate the purposes of the program or to facilitate the practical administration of the program." We do not view 16 U.S.C. § 590p(b)(v) as providing the statutory authority necessary to satisfy the exception to section 10 just mentioned, because the former statute does not "explicitly" provide for or prohibit administrative offset.

We are not aware of anything in the language or legislative history of section 10 which addresses the question of prospective/retrospective application. Thus, the question becomes whether retrospective application of the procedural requirements of section 10 would result in "manifest injustice" in this case. This, according to the Bradley Court, requires consideration of "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Id. at 717.

We have carefully considered the Bradley decision and conclude that it does not require retrospective application of the section 10 procedures in this case. Unlike Bradley, this case involves the simple collection of a debt, and is analogous to a "routine private lawsuit." Bradley, 416 U.S. at 718. Also, retrospective application here would affect the Government's "matured, unconditional right" to collect a debt owed to it. Id., at 720. Further, retrospective application would impose a significant additional burden upon the Government with no corresponding benefit to Greenstreet Farms except to produce additional delay in the payment of an admittedly past due debt. A key factor in our conclusion is our finding, to which we now turn, that the procedures SCS actually followed in this case provided the substantial equivalent of what section 10 now requires.

2. Adequacy of the procedures followed by SCS

The purpose of the procedural protections in section 10 was to guarantee that debtors receive their "due process" rights. According to the legislative history of section 10:

> "In establishing these procedures, it is the [Congress'] intention to provide the debtor with his full due process rights. It is not the [Congress'] intention to unreasonably delay the set off procedure when it has been [properly] determined that it should be

used. * * *" S. Rep. No. 378, supra, at 24.[2]/

Clearly, the section 10 procedures were intended to assure that debtors receive only their "full due process rights," not duplicative procedures that would "unreasonably delay the set off." This conclusion is consistent with the provisions of the revised FCCS which provide:

> "In cases where the procedural requirements specified in [section 102.3 of the FCCS] have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority, * * * the agency is not required to duplicate these requirements before taking offset." FCCS, § 102.3(b)(2)(ii), 49 Fed. Reg. at 8898.[3]/

In order to evaluate the adequacy of the procedures followed by SCS prior to offset against Greenstreet Farms, we compared those procedures to the procedures specified in section 10. The procedures followed by SCS were prescribed in the various contractual agreements between Greenstreet Farms and the Government which incorporated by reference the provisions of the governing regulations, 7 C.F.R. pts. 631 and 713. In the original contractual agreement, Greenstreet Farms agreed to be bound by the SCS regulations which governed the Great Plains Conservation Program. Those regulations include detailed provisions for a due process-styled ./

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[2]/ These comments were originally made with regard to language contained in section 5 of the Senate version (S.1249) of the bill which became the DCA. Virtually identical language was subsequently inserted into the new section 10 of the final version which became the DCA. Compare S.1249, 97th Cong., 1st Sess. § 5 (July 17, 1981) with DCA, § 10, Pub. L. No. 97-365, 96 Stat. 1749, 1754-55 (1982).

[3]/ See also the Supplementary Information statement which accompanied the revised FCCS. 49 Fed. Reg. 8889, 8891 ("Another commenter pointed out that an agency should not be required to provide procedural protections twice on the same debt. We agree, and have added a new § 102.3(b)(2)(ii) to reflect this.").

notice and opportunity to be heard, as well as provision for administrative setoff. 7 C.F.R. § 631.25. In the non-compliance agreement, Greenstreet Farms admitted that it had violated the contract and agreed to refund to SCS the amount that it had received in violation of the contract. Greenstreet Farms was then allowed to enter into an installment repayment agreement.

Up to this point, we think it is clear that the procedures followed in this case were substantially equivalent to those required by section 10, and did provide "full due process rights." Compare 31 U.S.C. § 3716(c); S. Rep. No. 378, supra, at 24. The next step, the waiver by Greenstreet Farms of any further rights of notice and appeal, was also proper. The Supreme Court has recognized that constitutional and statutory rights to notice and hearing may be waived, so long as the waiver is voluntarily, knowingly, and intelligently made. E.g., D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972), citing National Equipment Rental Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964). Thus, for example, even though section 10 is mandatory, debtors and agencies implicitly retain the authority to contractually agree to, and become legally bound by, different procedures. While Greenstreet Farms, of course, did not waive any rights under section 10 (it could not have done so since both the original agreement and the non-compliance agreement were executed before section 10 was enacted), it could and did waive its rights under the substantially equivalent provisions of the relevant contracts and regulations. Consequently, we think Greenstreet Farms (1) received its "full due process rights" under the procedures followed by SCS, and (2) effectively waived its rights to any further notice or procedures.

3. Collecting the full amount

When it acknowledged its debt, Greenstreet Farms asked SCS to enter into a 3-year installment work-out agreement with a year delay built into it. At that time, SCS was legally entitled to take any action available to it, including offset, to recoup the entire amount owed by Greenstreet Farms. SCS did not have to accede to the request of Greenstreet Farms. Nevertheless, SCS chose to forebear on its right to immediate collection of the full amount, and agreed to enter into an installment work-out agreement, conditioned upon certain rights to which SCS would have been entitled under the common law, including the assessment of interest

on past due amounts.[4]/ Greenstreet Farms did not object to the terms specified by SCS and thus apparently agreed to the offer put forth by SCS.

Greenstreet Farms failed to live up to its obligations under the work-out agreement which it had requested. Payment was not made on the date due or at anytime thereafter. After affording Greenstreet Farms ample time and opportunity to make up the late payment or offer an explanation of its failure, SCS considered the work-out agreement "void" and proceeded to initiate collection on the original debt. Contrary to the assertions of Greenstreet Farms, the actions of SCS did not constitute an illegal acceleration of the installment work-out agreement. Under long-settled rulings of the Supreme Court, except when expressly agreed by the parties, the acceptance of a work-out agreement does not discharge indebtedness arising under the original contract unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the work-out agreement did not exist.[5]/

Consequently, SCS was fully justified in treating the work-out agreement as void and initiating collection pursuant to the terms of the original contract and non-compliance agreement. The argument that SCS failed to properly serve notice upon Greenstreet Farms prior to taking offset is equally without merit. Under the terms of the various contracts, agreements, and incorporated regulations, Greenstreet Farms had already waived any further notice rights, see, e.g., 7 C.F.R. § 631.25(a), and had authorized the taking of offset against the payments due it under the Feed Grain, Rice, Upland Cotton, and Wheat Programs in order to collect any debt it owed to the United States, 7 C.F.R. § 713.113 (incorp. by ref., 7 C.F.R. pt. 13).

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[4]/ See B-212222, Aug. 23, 1983, citing Young v. Godbe, 82 U.S (15 Wall.) 562, 565 (1873) (common law authority to assess interest).

[5]/ See, e.g., The Kimball, 70 U.S. (3 Wall.) 37, 45 (1865); Segrist v. Crabtree, 131 U.S. 287, 289-90 (1889). See also Mid-Eastern Electronics v. First National Bank of Southern Maryland, 455 F.2d 141, 144-45 (4th Cir. 1970); In re Mid-Atlantic Piping Products of Charlotte, 24 Bankr. 314 (Bankr. W.D.N.C. 1982).

Accordingly, we conclude that SCS has satisfied the requirements for due process-styled procedures that are applicable in this case, and may use administrative offset to collect the debt of Greenstreet Farms.

for Comptroller General
of the United States