

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 9:11-cv-80751-DTKH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGAR MITCHELL,

Defendant.

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM OF LAW**

DEFENDANT, EDGAR MITCHELL, by and through his attorney files this Defendant's Motion for Summary Judgment and Memorandum of Law pursuant to Federal Rules of Civil Procedure Rule #56.

1. Based upon Plaintiff's Complaint [ECF Doc 1] and the Notice of Filing Correspondence of Christopher C. Kraft, Jr. Dated 8/29/2002 [ECF Doc 10] along with Defendant's Motion to Dismiss Case [ECF Doc 8] and Memorandum of Law in Support of Motion to Dismiss [ECF Doc 9] there is no genuine issue as to any material fact. The Plaintiff admits in its Complaint that the camera was used during NASA's exploration of the moon during the Apollo 14 mission and that Edgar Mitchell was the Lunar Module pilot on Apollo 14. The Plaintiff has admitted in paragraph 12 of the Complaint that NASA has "no record" of its camera ever being transferred to the Defendant, emphasis added. In paragraph 11 of the Complaint NASA claims the camera "remains the property of NASA unless explicitly released or transferred to another party.", emphasis added. Plaintiff has admitted the transfer

occurred in 1971 and that it had no records of the transfer.

2. Pursuant to the Notice of Filing Correspondence of Christopher C. Kraft, Jr. Dated 8/29/2002 [ECF Doc 10], Christopher C. Kraft, Jr. was Director of Flight Operations for NASA, Deputy Director of JSC from 1970 to 1972 and Director of JSC from 1972 to 1982.
3. Christopher C. Kraft, Jr. clearly states in the correspondence that "It was general policy for the flight crews (astronauts) that made the Apollo flights to be allowed to keep as mementos various pieces of personal equipment that they used or carried on these flights. Also, because the Lunar Module was not returned, it was generally accepted that the astronauts could bring back pieces of equipment or hardware from this spacecraft for a keepsake of these journeys. NASA deliberately made this policy to establish that these type of items could be kept by the flight crews and dispensed as they saw fit." and "As part of the JSC management, I personally and officially signed off on this policy for NASA and the US Government."
4. Accordingly there is no material fact that can controvert that the transfer occurred as a gift to Edgar Mitchell in 1971 as a matter of the written policy of NASA. Plaintiff knew or should have known of same. There is no dispute that NASA was in control of there own records and they have no record of transfer by there own admission.
5. Paragraph 21 of Plaintiff's Complaint makes the allegation that Dr. Mitchell has "failed to provide any evidence establishing his legal right to the NASA camera". It is a matter of law that it is the Plaintiff's burden of proof to establish that they have a superior right to possession and ownership of the camera and that they have filed a timely action within four years of the Apollo 14 Mission, none of which is properly pled in the four corners of the Complaint, thereby rendering the case Dismissible

with Prejudice or proper for entry of Summary Judgment for the Defendant.

6. Even the Plaintiff cannot correct this error due to the fact that the law is clear in Florida that the delayed discovery rule does not apply to Replevin and Conversion. The Plaintiff should have known the law pertaining to the delayed discovery rule before filing suit for Replevin and Conversion.
7. Lastly the Notice of Filing Correspondence of Christopher C. Kraft, Jr. Dated 8/29/2002 [ECF Doc 10] establishes the NASA policy of giving gifts to the astronauts such as the Defendant at the time of the transfer in question.
8. The fact that the Plaintiff's Complaint in paragraph 7 alleges discovery of the camera sale pending on March 17, 2011 at Bonhams Auction House does not create a material disputed fact. The discovery in March 17, 2011 does not allow for delayed discovery rule application and all the claims of the Plaintiff should be barred as untimely pursuant to *Davis vs. Monahan*, 832 So.2d 708 Fla: Supreme Court (2002).
9. The Plaintiff's Complaint alleges and admits against its own interest that Dr. Mitchell obtained the camera during his NASA service, which is true. However, it is a matter of public record that Dr. Mitchell retired from NASA in 1972 and the mission occurred in 1971. Even if Dr. Mitchell had converted the camera as the Plaintiff alleges, the applicable limitations period for Conversion or Replevin actions is four years, which expired 35 years ago by the Plaintiff's own admission. The limitations periods for Conversion and Replevin are not subject to any delayed discovery rule. See *Davis v. Monahan*, 832 So.2d 708 Fla: Supreme Court 2002. Therefore, as pleaded the Conversion and Replevin claims clearly are time-barred and Summary Judgment should be granted in favor of the Defendant.
10. Due to the fact that both the Conversion and Replevin causes of action are time-

barred and the Government admits it has no record of the transfer, the Government's cause of action for declaratory judgment is moot, presenting no material facts in dispute for the Court. Accordingly Summary Judgment is proper in favor of the Defendant.

11. The Defendant has retained counsel to defend himself in this matter, has obligated himself to pay counsel a reasonable fee, has also incurred costs and seeks to recover the attorney's fees and costs in this matter.

WHEREFORE Defendant seeks entry of Summary Judgment against the Plaintiff and an award of attorney's fees, cost, interest and whatever further relief this Court deems just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date July 25, 2011 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Respectfully submitted this July 25, 2011.

By: /s/ Donald N. Jacobson, Esq.
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