

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGAR MITCHELL,

Defendant.

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MOTION TO DISMISS CASE

Defendant, EDGAR MITCHELL, respectfully files this Motion to Dismiss under Rule 12(b) and moves this Court to enter an Order Dismissing this Case on the grounds stated below:

1. Paragraphs 1, 13 and 20 of Plaintiff's Complaint state that the U.S. Government has made "numerous requests for return of the camera", but fails to attach any evidence of the request and has not verified this Complaint. Accordingly a primary element of Replevin and Conversion causes of action fails to appear in the four corners of the Complaint, rendering the Complaint dismissible.
2. Paragraphs 11 and 12 of Plaintiff's Complaint state that NASA retains title to all equipment it uses unless "explicitly released or transferred to another party", and that NASA "has no record" of the camera having been "transferred" to Dr. Mitchell. Plaintiff has cited no Code, Statute, Manual or Contract and has failed to attach any documentation showing their rightful title or ownership within the four corners of the Complaint, rendering the Complaint dismissible. Plaintiff has intentionally omitted the fact that NASA abandoned the camera by attaching it to the lunar module in question which in fact was destroyed on the moon in the year 1971. The Complaint further fails to state that Dr. Mitchell was able to retrieve the

camera from the lunar module and returned to Earth with the camera, after which it was presented back to him by NASA, after he was quarantined. Plaintiff fails to attach a record of this transfer and has failed to plead that it came into Dr. Mitchell's possession at that time or a later date. In either event this action has been brought decades after the expiration of the limitation of actions period of four years for Replevin and Conversion as is apparent from the face of the Complaint rendering the Complaint dismissible with prejudice due to blatant untimeliness.

3. Paragraph 21 of Plaintiff's Complaint makes the particularly offensive 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. 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. The Plaintiff should have known the law pertaining to the delayed discovery rule.
4. 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 should be dismissed with prejudice. The Plaintiff is on Constructive Notice of the case law and is presently on actual notice of the law.

5. Due to the fact that both the Conversion and Replevin causes of action are time-barred, the Government's cause of action for declaratory judgment is moot, presenting no justiciable controversy for the Court, rendering the case dismissible with prejudice.
6. 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, EDGAR MITCHELL, seeks Dismissal of Plaintiff's Complaint with Prejudice an award of Attorney's fees, cost, interest and whatever this Court deems just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date July 19, 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 19, 2011.

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

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Florida Bar No: 0844098

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