UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
v.)
)
EDGAR MITCHELL,)
)
Defendant.)
_____)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Preliminary Statement

Dr. Edgar Mitchell is an American hero. He served this country as a Navy pilot, backup lunar module pilot for Apollo 10, lunar module pilot for Apollo 14 (where he walked on the moon), and capsule communicator (capcom) for Apollos 15 and 16. President Nixon presented him with the Presidential Medal of Freedom in 1970, and Dr. Mitchell retired from NASA in 1972.

Now the U.S. Government, on the basis of nothing but an alleged lack of records, has filed this suit seeking return of a camera that was used by Dr. Mitchell on the moon and given to him by NASA as a gift in accordance with usual practice at the time. The suit is both untimely and implausible on its face, and should be dismissed.

Law Applicable to Motions to Dismiss

A dismissal for failure to state a claim is appropriate when it appears that the plaintiff can prove no set of facts that would entitle him to relief. A motion to dismiss "will be granted where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Canon* v. *Clark*, 883 F. Supp. 718, 720 (S.D. Fla. 1995). Dismissal is justified "'when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim.'" *Ibid*. (quoting 5A Charles Alan Wright & Arthur B. Miller, FEDERAL PRACTICE AND PROCEDURE § 1357 (1995)).

In assessing the sufficiency of a complaint, the Court may consider "the face of the complaint," *Brooks* v. *Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997), as well as orders and other matters of public record, *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1535, n.1 (S.D. Fla. 1993). The Court may also take judicial notice of "scientific" facts, "historical" facts, or any other matters "not subject to

reasonable dispute". Fed.R.Evid. 201; *Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997).

The U.S. Supreme Court has declared that complaints which rely on "naked assertions" rather than on "plausible" facts do not satisfy Fed. R. Civ. P. 8 and must be dismissed. See *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). As the Supreme Court explained:

> [T]he pleading standard Rule 8 announces demands more than an unadorned the-defendant-unlawfully-harmed-me accusation….
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement', but it asks for more than a sheer possibility that the defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'

Ashcroft, supra, 129 U.S. at 1949 (citations omitted).

I – THE GOVERNMENT'S CONVERSION AND REPLEVIN CLAIMS ARE UNTIMELY

Florida imposes a four-year statute of limitations on intentional tort claims such as conversion and replevin. Statutes of limitation begin to run "at the time the cause of action accrues." *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 85 F.3d 1514, 1518 (11th Cir. 1996) (citing Fla. Stat. Ann. § 95.031)), and a cause of action accrues when the last element constituting the cause of action occurs, in this case, the alleged "conversion" of the camera. There is no "delayed discovery rule" for conversion or replevin, so the plaintiff's actual "discovery" of the alleged tort is irrelevant. See *Davis v. Monahan,* 832 So.2d 708 Fla: Supreme Court (2002*).*

The Complaint alleges that the camera at issue "was apparently taken into possession by Defendant during his employment with NASA" (Complaint ¶25). It is easily established, and the Court can take judicial notice of the fact, that Dr. Mitchell's employment with NASA ended more than four years ago – *in 1971 in fact*. The Government alleges no facts on the basis of which a 40-year old alleged conversion of property may be the subject of a tort action in Florida. Nor can the Government allege any such facts. Therefore, the Complaint must be dismissed without leave to amend.

II – THE GOVERNMENT'S CLAIMS ARE INHERENTLY IMPLAUSIBLE

The Government alleges no facts whatsoever regarding how Dr. Mitchell allegedly obtained the camera, other than to say that NASA has "no record" of it and that it "apparently" happened while Dr. Mitchell worked at NASA. However, the Court can take judicial notice of the fact that Dr. Mitchell, along with his fellow Apollo 14 astronauts, was quarantined for three weeks after re-entry and splashdown in accordance with then-existing federal regulations.[1] During the quarantine period, NASA had sole access to, and control over, all equipment used during the astronauts' missions, which would of course have included the camera at issue here. The equipment was inventoried and studied, and kept on premises maintained at all times by the Government.

The Government's suggestion that Dr. Mitchell could somehow have obtained possession of and removed a piece of equipment such as this camera during quarantine or thereafter without NASA's knowledge and consent is so implausible as to demand further factual substantiation, which the Government does not offer.[2] This is a textbook example of a case, like *Iqbal*, where a complaint alleges no more than a "sheer possibility that a defendant has acted unlawfully". Dr. Mitchell knows he received the camera from NASA officials as a gift, and all the Government can say is that it *doesn't know one way or the other*. If the Government wishes to make allegations such as these against a person such as Dr. Mitchell, the Government must plead fact with specificity. The Government/Plaintiff has not met its burden and the Complaint should be dismissed with prejudice.

III – THE DECLARATORY JUDGMENT CLAIM MUST BE DISMISSED

Parties seeking a declaratory judgment in federal court must show: "(1) that they personally have suffered some actual or threatened injury as a result of the alleged conduct of the defendant; (2) that the injury fairly can be traced to the challenged action; and (3) that it is likely to be redressed by a favorable decision." *GTE Directories Pub. Corp. v. Trimen Am., Inc.,* 67 F.3d 1563, 1567 (11th Cir. 1995); *see also Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co*., 68 F.3d 409, 414 (11th Cir. 1995) (showing must be made based on the "state of affairs as of the filing of the complaint". It is settled that "The operation of the Declaratory Judgment Act is procedural only," *Household Bank v. JFS Group*, 320 F.3d 1249, 1253 (11th Cir.2003) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463, 81 L.Ed. 617 (1937)), and that the [Declaratory Judgment Act] does not create remedies otherwise unavailable to the

[1] Regulations relating to "Extraterrestrial Exposure" were published at 14 CFR §1211 in 1969, before the Apollo 11 mission. All astronauts from Apollo 11, 12 and 14 were so quarantined, for a period of 21 days. The regulations were repealed in 1991.

[2] It is also worth noting, and not subject to dispute, that the camera at issue here was attached to the lunar module, a spacecraft designed to be crashed to the moon once it had delivered the moonwalking astronauts back to the command module. The camera obviously was considered expendable by NASA at the time. For logistical reasons relating to preservation of the tape inside the camera, Dr. Mitchell unbolted the camera from the lunar module before leaving the moon, and the camera returned to earth.

plaintiffs" in the anticipated coercive action. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 (5th Cir.2000).

In this case, because the Government cannot prevail on either the Conversion or Replevin causes of action, it cannot proceed with its Declaratory Judgment cause of action either. That cause of action must be dismissed with prejudice as moot and untimely.

Conclusion

The Complaint should be DISMISSED with prejudice and the Court should reserve jurisdiction to award sanctions, attorney's fees, cost, interest and whatever further relief 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.

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