

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

CASE NO. 11-80751-CIV-HURLEY/HOPKINS

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDGAR MITCHELL,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
DENYING AS MOOT PLAINTIFF'S MOTION TO STRIKE**

THIS CAUSE is before the Court upon Defendant Edgar Mitchell's Motion to Dismiss [DE # 8]. The United States, the plaintiff in this action, responded on August 5, 2011 [DE # 14]. Defendant filed a reply twenty-one days later on August 26, 2011. Plaintiff then filed a Motion to Strike [DE # 23] in which it correctly pointed out the untimeliness of Defendant's reply. Plaintiff also argued that Defendant had impermissibly raised new arguments in the reply that it had not presented in its Motion to Dismiss. Notwithstanding Plaintiff's potentially meritorious Motion to Strike, the Court, in an abundance of caution, has reviewed the reply and determined that even if fully considered it would not alter the Court's decision. Therefore, the Motion to Strike will be denied as moot.

As to the Motion to Dismiss, the Court has reviewed the filings and determined that the motion should be denied. As set out more fully below, Defendant's arguments fail to demonstrate that Plaintiff has not stated a claim upon which relief can be granted. In particular, Defendant has not shown that Plaintiff's claims are inevitably barred by a statute of limitations, nor has Defendant

shown that the property alleged to have been converted must have either abandoned or consensually transferred to Defendant as a gift. Therefore, Defendant's motion to dismiss will be denied.

BACKGROUND

The United States commenced this action against Edgar Mitchell, a former astronaut once employed by the National Aeronautics and Space Administration ("NASA"), to recover a "data acquisition camera" used during NASA's exploration of the moon in the mission known as Apollo Fourteen. Defendant, who participated in Apollo Fourteen in 1971, planned to sell the camera at auction through Bonhams, a privately owned British auction house. Plaintiff first became aware of the plans to sell the camera on March 17, 2011. Plaintiff then filed its four-count complaint¹ on June 29, 2011 ultimately seeking recovery of the camera and damages, including attorney's fees.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1345 because the United States is the plaintiff. Venue is proper under 28 U.S.C. § 1391(b)(1) because Defendant resides in Palm Beach County.

DISCUSSION

Granting a motion to dismiss is appropriate when a complaint contains simply "a formulaic recitation of the elements of a cause of action." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss, a complaint must contain factual allegations that "raise a

¹Count one seeks declaratory judgment that the camera is the exclusive property of the United States. Count two asserts a claim for conversion and on that basis seeks immediate return of the camera and damages, including attorney's fees. Count three requests the Court issue a writ of replevin ordering return of the camera. Count four requests an injunction prohibiting Defendant from arranging the sale of the camera.

reasonable expectation that discovery will reveal evidence” in support of the claim and that plausibly suggest relief is appropriate. *Id.* On a motion to dismiss, the complaint is construed in the light most favorable to the non-moving party, and all facts alleged by the non-moving party are accepted as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986). The threshold is “exceedingly low” for a complaint to survive a motion to dismiss for failure to state a claim upon which relief can be granted. *See Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985). Regardless of the alleged facts, a court may dismiss a complaint on a dispositive issue of law. *See Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

Defendant challenges the legal sufficiency of the complaint on two primary grounds. First, Defendant argues that the action is untimely—that is, that the claims are barred by the applicable statutes of limitation. Defendant also argues that the claim for conversion fails because the camera was in fact a gift or, alternatively, that Plaintiff had abandoned it.

1. Untimeliness

In its Motion to Dismiss, Defendant relied exclusively on Florida law in support of its argument that the action was untimely. Defendant failed, however, to provide any basis for the application of Florida law. Plaintiff asserts that federal law controls disputes regarding government property, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943), and points out that, in any event, a state statute of limitations does not apply to the United States as a plaintiff. *United States v. Moore*, 968 F.2d 1099, 1100 (11th Cir. 1992) (“It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.”)

(quoting *United States v. Summerlin*, 310 U.S. 414, 416 (1940))). The Court agrees that in no event would the law cited by Defendant apply to bar the United States' claims.

In its reply, Defendant abandoned its argument under state law in favor of new arguments under the federal statutes of limitation. Without approving the propriety of raising these new arguments in its reply, the Court, in the interest of judicial economy, will address these arguments with the following findings. First, the Court finds that under 28 U.S.C. § 2415(c), which provides that “[n]othing herein shall be deemed to limit the time for bringing an action to establish title to, or right of possession of, real or personal property,” Plaintiff’s claim for declaratory relief is not untimely. Second, the Court finds that under 28 U.S.C. 2416(c), the limitations periods exclude periods during which “facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstance.” Accordingly, the Court cannot determine that Plaintiff’s conversion and replevin claims are barred unless it also determines that Plaintiff had constructive knowledge of the facts material to the right of action prior to its discovery of the auction on March 17, 2011. While it remains possible that Defendant could make such a showing, for the purposes of the instant motion the Court will not endeavor to make such a potentially fact-sensitive determination. Even if this question could be resolved as a matter of law, Defendant’s failure to appropriately raise its federal statute of limitations argument provides an additional basis for the Court’s refusal to do so at this time.

2. *Gift or Abandonment*

Defendant also contends that the camera was not the subject of a conversion but rather was

either abandoned by the United States or was a gift. Plaintiff's response raises concerns regarding the legal viability of these defenses in light of the Federal Property and Administrative Services Act of 1949. *See, e.g., Warren v. United States*, 234 F.3d 1331, 1338 (D.C. Cir. 2000); *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941). Even aside from these arguments, however, the Court finds that resolving whether the camera was converted or was the subject of a gift or abandonment is inappropriate for the purposes of the instant motion. This is a factual determination that cannot be resolved as a matter of law on the record established thus far. At this stage, all Plaintiff must do is make factual allegations that "raise a reasonable expectation that discovery will evidence" in support of the claim and that plausibly suggest relief is appropriate. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiff meets that burden in this case by alleging that it once held title to the camera, that it retains such title unless explicitly released, and that it never released title to the camera to Defendant. Defendant's allegations that NASA intended the camera to be destroyed after the mission or that it routinely awarded used mission equipment to astronauts do not preclude as a matter of law Plaintiff's contrary allegation that Defendant impermissibly converted the camera.

CONCLUSION

In light of the foregoing, Defendant's motion to dismiss based on untimeliness or on its theories that the camera was a gift or abandoned must be denied. Additionally, Defendant's argument to dismiss the declaratory judgment count is premised on the dismissal of the conversion and replevin counts and must therefore also fail. Finally, because the Court is denying the motion to dismiss regardless of the status of Defendant's reply, Plaintiff's Motion to Strike the reply will be

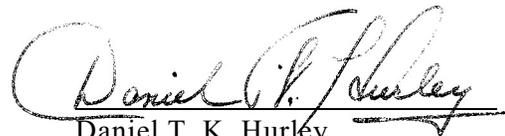
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denied as moot.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's Motion to Dismiss [DE # 8] is **DENIED**.
2. Plaintiff's Motion to Strike [DE # 23] is **DENIED AS MOOT**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 3rd day of October,
2011.


Daniel T. K. Hurley
United States District Judge

Copies provided to counsel of record