

In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 05-1187C

(Filed August 15, 2007)

ATHER H. BUTT,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. Plaintiff Ather H. Butt has filed a claim against the United States, alleging that the National Aeronautics and Space Administration ("NASA") has failed to compensate him for using the description of an invention he had sent to NASA in 1990. The government argues that Mr. Butt's cause of action would have accrued in 1991 or, at the latest, in 1992, after NASA emphatically denied his repeated requests for either compensation or a written guarantee not to use the description of his invention. For the reasons that follow, the government's motion is **GRANTED**.

I. BACKGROUND

With plaintiff acting *pro se*, his residence in Pakistan and the impact of this residence on the flow of communications with the government and with this Court have amplified the usual difficulties of *pro se* litigation. He initially filed a complaint against NASA in the U.S. District Court for the District of Columbia in 2004, but that court, construing the complaint to state a breach of an implied-in-fact contract and assuming that damages exceeded \$10,000, dismissed the complaint for lack of jurisdiction. *See Butt v. O'Keefe*, No. 04-2256, Mem. Op. at 2 & n.1 (D.D.C. Aug. 11, 2005). In dismissing the complaint, the District Court noted that claims for breach of an implied contract seeking more than \$10,000 were claims within this Court's jurisdiction. *Id.* at 2.

Thus, Mr. Butt brought the matter to this Court. Mister Butt claims to have invented technology that could be used to create a “hypersonic” aircraft. Attached to his complaint, plaintiff included copies of correspondence with NASA dating back to 1989. In 1989, plaintiff first contacted NASA to ask if it was interested in his alleged invention. Defendant’s Motion To Dismiss (Def’s. Mot.) Appendix (App.) at 9.¹ The letter, dated November 22, 1989, was addressed to “Chief Executive” and apparently² read as follows:

Dear Sir.

I am an inventor and have formed the idea of aircraft having the following qualities:

1. That it will not emit sonic booms.
2. That it will not emit shock waves.
3. That it will be capable of flying at all supersonic speeds and possibly even at hypersonic speed.
4. That it will be capable of flying at subsonic altitude.
5. That it will have no problem of lift at take off.
6. That it will consume fuel at the rate of subsonic aircraft.
7. That it will be highly maneuverable [sic] in all respects, acceleration, lift and climb etc.
8. That compared with concorde its position will be like concorde’s position vs Wright brothers plane.

Scientists can see such a plane only in dreams, but this dream will now come true.

If you may be interested to know the idea please write.

Id.

NASA responded by writing that its “research in this area is relatively comprehensive and extreme performance gains of the type you suggest do not appear possible,” but nevertheless stated that its staff would review any concepts plaintiff shared with them in the ordinary course

¹ Copies of correspondence are attached to the complaint and un-numbered. The government has organized this correspondence into an appendix to its motion to dismiss without any omissions. Because the Court finds the government’s presentation of the correspondence to be easier to follow, the court will cite to this appendix in referring to Mr. Butt’s correspondence, and not to the attachments to his complaint.

² The Court states “apparently” as the copy of the letter, while signed, contains at its top the following: “(Memorized Copy of the First Letter Sent to NASA in 1989).” The Court will construe this to mean that it is a true copy of the letter.

of business. Def's. Mot. App. at 1. In a subsequent letter,³ NASA noted the receipt of a letter dated December 24, 1989 (not included with the complaint) and acknowledged that its understanding of the letter was that plaintiff was preparing a written description of his invention. Def's. Mot. App. at 2. NASA stated that it was "certainly acceptable" for plaintiff to send an "informational copy" of the invention's description, but that "[i]f you are requesting an endorsement or a commitment to financial support, it is not possible for NASA to respond affirmatively at this time." *Id.* In a letter dated May 27, 1990, plaintiff claimed to have enclosed a copy of the description of his invention. Def's. Mot. App. at 10.⁴

Plaintiff failed to include a copy of the actual invention description with his complaint, but the copy of the May 27, 1990 letter has the following notation at its bottom: "[ABOUT 80 PAGE DESCRIPTION OF INVENTION ENCLOSED WITH THIS LETTER AVAIL[A]BLE IN NASA RECORDS]." NASA apparently understood Mr. Butt's submission to be a paper about "fluid dynamics phenomena at the molecular level," which it found "intellectually stimulating but . . . outside the realm of [its] central interest." *See* Def's. Mot. App. at 3. NASA apparently sent plaintiff a collection of papers on fluid dynamics theory to thank him for his troubles. *See id.* Plaintiff repeatedly objected to NASA's characterization of his paper, stating that the document was a description of hypersonic aviation technology, not a paper about fluid flow. *See* Def's. Mot. App. at 14, 16-17.

Plaintiff's first demand for payment appeared in a letter dated February 19, 1991. Plaintiff's letter complained about NASA's lack of response to a previous letter, not included in the record, and claimed that NASA's "interest shown and express intention to welcome the idea obviously meant that you will happily pay the price of the idea if the technology is found to be workable." Def's. Mot. App. at 11. Plaintiff, however, also conceded that NASA went no further than having "hinted of paying remuneration when claims have been proved." *Id.* The director of NASA's Aerodynamics Division responded with another letter, stating that previous correspondence did not "indicate any possibility of providing remuneration to you for sharing your ideas with us. I am sorry if you misunderstood and felt that this was a possibility. NASA only provides payment for work that is conducted under a signed contract or grant." Def's. Mot. App. at 4. Plaintiff does not allege that he had either a signed contract or a grant.

Plaintiff sent NASA several more letters demanding payment of one million dollars, *see id.* at 13, which he later threatened to double, *see id.* at 14, and added interest of \$0.1 million per month. *See id.* at 16; *see also id.* at 15, 17-19. The exchange of letters apparently ended with a letter from NASA's general counsel dated February 4, 1992, informing plaintiff that NASA had

³ The letter seems to be undated, but there is a handwritten notation that appears to read "1 DEC 20, 89." *See* Def.'s Mot. App. at 2. It is not clear who made this note.

⁴ The letter included with the complaint again contains the notation: "(Memorized Copy of the Letter Covering Description of Invention Sent)." *See* Def.'s Mot. App. at 10; *see* note 2, *supra*.

never received a copy of his invention and that it considered the matter closed and would not respond to further correspondence. Def's Mot. App. at 6. Plaintiff sent several more letters without receiving a response from NASA and temporarily stopped sending letters in June 1992. Def's Mot. App. at 17-19.

Plaintiff resumed his correspondence with NASA in 2003 when he became convinced that NASA developed his invention and incorporated it into experimental aircraft, military reconnaissance aircraft, and space vehicles. Def's Mot. App. at 20-21. He claims that his invention has become the "axis of all NASA research and development programs." Def's Mot. App. at 24. Plaintiff accuses NASA of a conspiracy to deprive him of his invention and demands either payment or an assurance that NASA will not use his invention. *Id.* Plaintiff's belief is apparently based in part upon Internet articles, *see* Compl. ¶ 17, including one concerning certification by the Guinness World Records organization that NASA aircrafts had achieved speed records.⁵

II. DISCUSSION

Although this Court accords a *pro se* plaintiff leniency in presenting his case, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Young v. United States*, 60 Fed. Cl. 418, 426 (2004), plaintiff's *pro se* status does not immunize him from the requirement that he plead facts upon which a valid claim can rest. *Paalan v. United States*, 57 Fed. Cl. 15, 16 (2003). Nor does plaintiff's *pro se* status excuse him from demonstrating that this Court possesses jurisdiction over the claim he has submitted.

A. Breach of Implied Contract

The government moved to dismiss Mr. Butt's complaint for lack of subject matter jurisdiction, arguing that the claim is more than six years old and thus barred by 28 U.S.C. § 2501, the Court's statute of limitations. 28 U.S.C. § 2501; *see also* Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). While there has been some confusion over whether a dismissal based on a statute of limitations is a question of jurisdiction, *see Bolduc v. United States*, 72 Fed.Cl. 187, 189-92 (2006), current Federal Circuit precedent holds that our statute of limitations is indeed jurisdictional. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354-55 (Fed.Cir. 2006), *cert. granted in part*, No. 06-1164, 127 S. Ct. 2877 (2007).⁶

⁵ A copy of this is the last attachment to the Complaint.

⁶ A decision by a federal circuit court of appeals remains binding after the U.S. Supreme Court has granted certiorari and continues to remain binding unless the Supreme Court reverses the same decision. *See, e.g., Rutherford v. Crosby*, 438 F.3d 1087, 1089 (11th Cir. 2006) ("A grant of certiorari . . . is not a decision and does not affect our obligation, or the obligation of federal district courts in this circuit, to follow prior decisions of this Court."); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion,

Consequently, the question of whether Mr. Butt timely filed his complaint concerns this Court's jurisdiction. Normally, when considering a motion to dismiss -- even one based on the lack of subject matter jurisdiction -- the Court must accept all well-pleaded facts as true and draw all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Pixton v. B&B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747-48 (Fed. Cir. 1988); *Englewood Terrace Ltd. Ptnrshp. v. United States*, 61 Fed. Cl. 583, 584 (2004). But when jurisdictional facts are challenged, the burden falls on the plaintiff to demonstrate a court's jurisdiction by a preponderance of the evidence. *Reynolds*, 846 F.2d at 747-48; *Englewood Terrace*, 61 Fed. Cl. at 584. In examining the facts regarding jurisdiction, a court may consider all relevant evidence, including material outside of the pleadings. *Indium Corp. Of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985).

Even under the lenient manner in which the Court construes *pro se* complaints, determining the cause of action upon which Mr. Butt seeks to base his claim remains difficult. The district court, scrutinizing a presumably similar complaint,⁷ believed that plaintiff was attempting to state a claim for breach of an implied contract. Plaintiff alleges that it is "customary" for inventors to submit an "idea" to a potential manufacturer, and if the idea is selected for use and manufacture, an agreement *then* is concluded as to compensation and the like. Compl. ¶ 4. But not one of the letters from NASA promises to pay Mr. Butt anything for his ideas. The first letter states that the director of the aerodynamics division and his staff "as a normal course of business, will give appropriate consideration to new concepts that you may suggest." Def.'s Mot. App. at 1. The second letter, responding to plaintiff's request for an "undertaking" (made in a letter from plaintiff that is inconveniently omitted from the complaint), clearly states that if Mr. Butt were "requesting an endorsement or a commitment to financial support, it is not possible for NASA to respond affirmatively at this time." Def.'s Mot. App. at 2.

In any event, if there were some agreement between Mr. Butt and NASA whereby NASA would pay him for use of the description of the alleged invention he sent it, the government is correct that any claim for breach would have accrued more than six years before Mr. Butt filed his complaint. NASA first explicitly denied his demand for payment on March 18, 1991, when Director Louis J. Williams, responded to Mr. Butt's letter (dated February 19, 1991) requesting that NASA "honour [its] commitments and arrange to pay [his] remuneration." See Def.'s Mot. App. at 4, 11. Mister Williams's response stated that NASA had previously not "indicate[d] any possibility of providing remuneration to you for sharing your ideas with us." *Id.* at 4. Plaintiff made subsequent demands for compensation on June 12, July 10, and August 7 of 1991, the latter to which Edward A. Franke, NASA's General Counsel, responded more explicitly on

the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.")

⁷ Plaintiff states that the district court "deliberated on the same documents" that were submitted to this court. Pl.'s Opp. (filed May 11, 2006) at 2.

September 17, 1991. Def.'s. Mot. App. at 5, 12-14. Mister Franke plainly stated that NASA had no knowledge of the written invention disclosures Mr. Butt claimed to have provided and that it was consequently "inappropriate for NASA to consider your claim for compensation." Def.'s Mot. App. at 5. Further inquiry from Mr. Butt resulted in one final, definitive denial from Mr. Franke, dated February 4, 1992. See Def.'s Mot. App. at 6. In this letter, the General Counsel stated that: "This matter is now considered closed; we will not respond to future inquiries or correspondence from you concerning alleged submissions." *Id.* at 6. Any cause of action against the government for breach of contract, then, would have accrued no later than February 4, 1992 -- over thirteen years before Mr. Butt filed his complaint (and nearly thirteen years before the district court complaint was filed).

Plaintiff argues that his claim for damages did not accrue until he discovered, reading articles in the public domain, in 2003 "that NASA was developing a new aircraft." Pl.'s Opp. at 1-2. The Court does not find that plaintiff has carried his burden of demonstrating jurisdiction. Defendant has submitted in the appendix to its supplemental reply a sampling of news articles, also in the public domain, dated from September 24, 1990 through September 7, 1998, discussing NASA's development of supersonic and hypersonic aircraft. See Def.'s Supp. Reply App. at 1-25. Plaintiff has refused to respond, and has provided no reason why such articles would not provide notice that his alleged technology was being used, but the Guinness World Records report would.

The applicable statute of limitations bars claims before our Court "unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. Thus, if plaintiff seeks compensation for the breach of a contract to pay him for submitting the description of his alleged invention, his petition would have had to have been filed by February 3, 1998 at the latest. His petition was instead filed more than seven years too late. To the extent that plaintiff claims NASA breached a contract to pay him for his efforts, the defendant's motion to dismiss for lack of subject matter must be **GRANTED**.

Moreover, the Court notes that a dismissal on the alternative ground of failure to state a claim upon which relief may be granted, under RCFC 12(b)(6), would also be appropriate. An implied-in-fact contract requires the same elements of an express, written one: mutual intent, consideration, lack of ambiguity in the offer and acceptance, and the requisite authority of the government representative to bind the government. See *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990); *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). The complaint fails to contain any allegations that would support *any* of these elements, let alone all of them.

B. Did Plaintiff Raise a Claim for the Taking of Intellectual Property?

While plaintiff's complaint lacks factual allegations that would support a finding of an implied-in-fact contract, it does suggest that Mr. Butt's intention was to raise a claim for the taking of his intellectual property. The first sentence, on the caption page, reads: "The applicant

is the owner of an intellectual property which has been consumed by defendant but is not ready to render the account of the extent to which it was used by it.” While no agreement with the government is described (and, to the contrary, plaintiff instead stated that his 2003 contacts were an effort to get the government to “conclude an agreement for use and pay the price of the documents or clarify NASA’s position,” Compl. ¶ 18), plaintiff alleges that NASA “has achieved gains which are impossible to achieve without the use of [his] technology.” Compl. ¶ 16. *See also* Pl.’s Opp. to Def.’s Reply (filed July 31, 2006) at 1 (alleging “the use of my intellectual property”).

Normally when attempting to understand the complaint of a *pro se* litigant, the Court would convene a status conference or a hearing -- usually by telephone for the convenience of the plaintiff -- to discuss the allegations with the plaintiff and counsel for the defendant. Such a proceeding was not possible in this case, due to plaintiff’s location in Pakistan and his lack of access to a phone. *See, e.g.*, Order (Apr. 27, 2006); Pl.’s Status Report (filed Apr. 27, 2006); Pl.’s “Compliance of Order of April 27, 2006” (filed May 18, 2006). To accommodate plaintiff given these circumstances, the Court requested additional briefing from the parties. *See* Order (Jan. 10, 2007) at 2. The government was required to file a supplemental brief that addressed, among other things, when the statute of limitations would have begun to run for a takings claim based on plaintiff’s allegations, and whether “the complaint contain[ed] any defects (i.e. missing elements) that would require its dismissal for failure to state” a takings claim. *Id.*

Mindful of plaintiff’s *pro se* status, his brief was scheduled to follow the government’s, so that he might respond to any deficiencies identified and possibly fill in any missing blanks. The Court particularly asked him to detail whether his alleged technology was patented; what intellectual property protections existed where he lived when he developed the technology; whether “trade secrets or other forms of non-patented intangible property” were protected there, and “what must be shown in order for a confidential invention to be protected.” *Id.* at 3. He was also directed to answer the following: “Other than your conclusory allegations that your invention must have been used in order for NASA to have accomplished its recent speed records, do you have any specific information concerning the design of any of NASA’s aircrafts or spacecrafts that indicates that the alleged description of your invention was used?” *Id.*

The government timely filed its supplemental brief, which discussed plaintiff’s “failure to allege a specific property interest,” Def.’s Supp. Reply at 6; *see id.* at 4-6, and explained that plaintiff failed to allege a patent infringement or the taking of a trade secret. *Id.* at 6-9. Plaintiff has refused to submit a responsive brief, and instead has submitted documents requesting either that judgment be entered in his favor due to the government’s choosing to move for dismissal rather than answering his complaint, or that the case be transferred to a different judge. *See, e.g.*, Order (Feb. 5, 2007); Order (Feb. 12, 2007); Order (Feb. 20, 2007). These requests have been denied. *See* Order (Feb. 12, 2007).

It is clear to the Court that plaintiff’s complaint fails to adequately allege the taking of any recognizable property interest. And plaintiff has turned down the opportunity to add the

necessary allegations. The Court notes that the complaint includes the request that the government “[e]xplain by which new technology NASA has achieved those gains . . . which are not possible to achieve without the use of my invented technology.” Compl. at 7, ¶ a(v). But it is up to the plaintiff to plead the requisite elements of a cause of action, and to explain how the reported gains necessarily required the use of his technology. Conclusory statements and accusations alone do not add up to a valid cause of action, even were they to include the elements of a claim, as the Supreme Court has recently emphasized. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (explaining that a legitimate claim requires “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do”). Any sort of allegation must “raise a right to relief above the speculative level.” *Id.* Plaintiff has not even gone so far as to have recited the elements of a taking.

Under these circumstances, the Court would be warranted to recognize the attempt at stating a taking claim and to dismiss the claim under RCFC 12(b)(6). But perhaps the plaintiff did not intend to bring such a claim. Plaintiff, after all, admitted in one of the letters included with his complaint that he never sent an amount of information that was, in his view, enough for NASA to utilize in creating a hypersonic aircraft:

You are also sternly warned against any secret unilateral attempt to use the information for technological development of hypersonic aircraft as you appear to be planning. It will not only be illegal and immoral but also risky, dangerous and foolish as *information already sent is only original and not complete and some highly complicated and delicate points are still undisclosed in this description without knowing which your attempt can be catastrophic.*

Def’s. Mot. App. at 12 (emphasis added). Rather than dismiss a takings claim with prejudice, the Court will give plaintiff the benefit of the doubt and construe his failure to file a supplemental brief as an admission that his intention was not to raise a takings claim.

III. CONCLUSION

Because a breach of any implied-in-fact contract concerning plaintiff’s technology would have accrued, based on the allegations of the complaint, well more than six years prior to the filing of the complaint, the government’s motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. The Clerk is directed to close the case.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge