In the United States Court of Federal Claims

No. 10-26 C

(Filed: July 20, 2010)

KENNETH BOWLING, Plaintiff, v. THE UNITED STATES, Defendant.	Motion for Reconsideration Denied; No Change in Controlling Law, No Availability of Previously Unavailable Evidence, and No Manifest Error of Law or Mistake of Fact in Court's Opinion of June 7, 2010

Kenneth Bowling, Ontario, OR, pro se.

Vincent D. Phillips, with whom were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

HEWITT, Chief Judge

Before the court is plaintiff's Motion for Reconsideration, Summary of Complaint (plaintiff's Motion or Pl.'s Mot.), Docket Number (Dkt. No.) 22, filed June 28, 2010. Kenneth Bowling (plaintiff or Mr. Bowling) moves the court for reconsideration of the court's June 7, 2010 Opinion, Bowling v. United States (Bowling or Opinion), No. 10-26C, 2010 WL 2594319 (Fed. Cl. June 7, 2010). See Pl.'s Mot. 1. In Bowling, plaintiff asserted that the United States (defendant, United States or the government), acted with gross negligence in exposing him to roofing materials containing asbestos during the course of his employment with the Navy Public Works Center (PWC). Bowling, 2010 WL 2594319, at *1. This court concluded that it lacked subject matter jurisdiction over Mr. Bowling's claims, and that transfer of this case to another court was inappropriate. Id. at *3, 5. Plaintiff filed his Motion, seeking reconsideration of the court's earlier

ruling. Pl.'s Mot. 1. For the following reasons, plaintiff's Motion for Reconsideration is DENIED.

I. Background

In 1977, PWC employed Mr. Bowling in San Diego, California. Bowling, 2010 WL 2594319, at *1. Mr. Bowling asserts that during the course of his employment at PWC, he used roofing products manufactured by Johns Manville Corporation (Johns Manville Corp.) that contained asbestos and lacked proper warnings. Id.; Pl.'s Mot. 5. Further, Mr. Bowling asserts that PWC failed to follow proper safety measures as required by the Occupational Safety and Health Administration (OSHA). Bowling, 2010 WL 2594319, at *1; Pl.'s Mot. 5. Mr. Bowling seeks damages and a 100% disability rating from PWC for his complete and permanent disability resulting from asbestos exposure. Bowling, 2010 WL 2594319, at *1; Pl.'s Mot. 1. Mr. Bowling also seeks $10 million from Johns Manville Corp. for lack of warning labels on its products. Bowling, 2010 WL 2594319, at *1; Pl.'s Mot. 5.

Plaintiff seeks reconsideration, asserting that the United States Court of Federal Claims (CFC) has jurisdiction to hear his claims against the government and against Johns Manville Corp. under the "rule of necessity." Pl.'s Mot. 2-3, 7. Plaintiff asserts that the court has jurisdiction and can hear his tort claim because, as a pro se plaintiff, he should be held to a "less stri[n]gent standard[]." Pl.'s Mot. 4-5. Further, plaintiff asserts that jurisdiction is appropriate because he is seeking money damages in excess of $10,000. Pl.'s Mot. 2-3, 6.

II. Legal Standards

The applicable standards for reconsideration of final decisions are set forth in RCFC 59(a) and RCFC 60(b). Plaintiff does not invoke either rule in his filing.[1] See

[1] Under Rule 59 of the Rules of the Court of Federal Claims (RCFC), a plaintiff may seek reconsideration for any reason a new trial or rehearing has been granted or upon a demonstration of manifest injustice. RCFC 59(a)(1). Under RCFC 60, relief from final judgment may be granted if there has been "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." RCFC 60(b)(3). Although plaintiff does not seek expressly seek reconsideration or relief under either RCFC 59 or 60, there are no allegations of fraud, misrepresentation, or misconduct in plaintiff's Motion for Reconsideration, Summary of Complaint (plaintiff's Motion or Pl.'s Mot.). See Pl.'s Mot. passim. Further, plaintiff's Motion is timely filed under RCFC 59. See RCFC 59(e). Accordingly, the court will address plaintiff's Motion as a motion for reconsideration under RCFC 59.

Pl.'s Mot. passim. RCFC 59(a) provides that rehearing or reconsideration may be granted as follows:

> (A) for any reason for which a new trial has heretofore been granted in an action at law in federal court; (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

RCFC 59(a)(1). Further, "[t]he court may, on motion under this rule, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." RCFC 59(a)(2). "A motion to alter or amend a judgment must be filed no later than 30 days after the entry of the judgment." RCFC 59(e). Plaintiff's Motion was filed on June 28, 2010 and was timely filed.

"The decision whether to grant reconsideration lies largely within the discretion of the [trial] court." Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990). "The court must consider such motion with 'exceptional care.'" Henderson County Drainage Dist. No. 3 v. United States (Henderson), 55 Fed. Cl. 334, 337 (2003) (quoting Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 300 (1999)). "A motion for reconsideration is not intended, however, to give an 'unhappy litigant an additional chance to sway' the court." Matthews v. United States, 73 Fed. Cl. 524, 525 (2006) (quoting Froudi v. United States, 22 Cl. Ct. 290, 300 (1991)). "Motions for reconsideration should not be entertained upon 'the sole ground that one side or the other is dissatisfied with the conclusions reached by the court, otherwise the losing party would generally, if not always, try his case a second time, and litigation would be unnecessarily prolonged.'" Fru-Con Constr. Corp., 44 Fed. Cl. at 300 (brackets omitted) (quoting Seldovia Native Ass'n Inc. v. United States, 36 Fed. Cl. 593, 594 (1996), aff'd, 144 F.3d 769 (Fed. Cir. 1998)).

The moving party must support its motion for reconsideration by a showing of exceptional circumstances justifying relief, based on a manifest error of law or mistake of fact. Henderson, 55 Fed. Cl. at 337; Principal Mut. Life Ins. Co. v. United States, 29 Fed. Cl. 157, 164 (1993). "Specifically, the moving party must show: (1) the occurrence of an intervening change in the controlling law; (2) the availability of previously unavailable evidence; or (3) the necessity of allowing the motion to prevent manifest injustice." Matthews, 73 Fed. Cl. at 526 (citing Griswold v. United States, 61 Fed. Cl. 458, 460-61 (2004)). Accordingly, the moving party "must do more than 'merely reassert[] arguments which were previously made and were carefully considered by the court.'" Bannum, Inc. v. United States (Bannum), 59 Fed. Cl. 241, 243 (2003). A court "will not grant a motion

for reconsideration if the movant 'merely reasserts . . . arguments previously made . . . all of which were carefully considered by the Court.'" Ammex, Inc. v. United States, 52 Fed. Cl. 555, 557 (2002) (emphasis and omissions in original) (quoting Principal Mut. Life Ins. Co., 29 Fed. Cl. at 164).

Further, even a pro se party may not "prevail on a motion for reconsideration by raising an issue for the first time on reconsideration when the issue was available to be litigated at the time the complaint was filed." Matthews, 73 Fed. Cl. at 525-26 (citing Lamle v. Mattel, Inc., 394 F.3d 1355, 1359 n.1 (Fed. Cir. 2005)). Similarly, a motion for reconsideration "should not be based on evidence that was readily available at the time the motion was heard." Seldovia Native Ass'n Inc., 36 Fed. Cl. at 594.

In a motion for reconsideration, under RCFC 59(a), "manifest" is understood as "clearly apparent or obvious." Ammex, Inc., 52 Fed. Cl. at 557. "'Manifest injustice' thus refers to injustice that is apparent almost to the point of being indisputable." Pac. Gas. & Elec. Co. v. United States, 74 Fed. Cl. 779, 785 (2006), rev'd on other grounds, 536 F.3d 1282 (Fed. Cir. 2008).

III. Discussion

A. There Has Been No Change in Controlling Law

The jurisdiction of the CFC is set forth in the Tucker Act, 28 U.S.C. § 1491 (2006). The Tucker Act provides that the CFC has jurisdiction to hear claims against the United States founded upon "any Act of Congress or any regulation of an executive department . . . for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (emphasis added). Therefore, the CFC lacks the authority to hear tort claims against the United States because the Tucker Act expressly excludes such claims from the jurisdiction of the court. See Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997) (citing 28 U.S.C. § 1491(a); Keene Corp. v. United States, 508 U.S. 200, 214 (1993)); see also Souders v. S.C. Pub. Serv. Auth. (Souders), 497 F.3d 1303, 1307 & n.5 (Fed. Cir. 2007) (holding that plaintiffs' negligence claims sounded in tort and thus were beyond the jurisdiction of the CFC and could not be transferred there).

Further, the CFC has jurisdiction only over claims against the United States. 28 U.S.C. § 1491(a)(1); see United States v. King, 395 U.S. 1, 2-3 (1969) (stating that the jurisdiction of the CFC is "limited to money claims against the United States [g]overnment"); RCFC 10(a) (stating that the title of the complaint must designate the United States as defendant); see also RCFC 4 rules committee note (2002) (stating that "only the United States is properly the named defendant"). In his Motion, plaintiff reiterates that he is seeking money from the United States and from Johns Manville Corp.

Pl.'s Mot. 5-6. The CFC has no jurisdiction to hear cases brought against any defendant other than the United States government. See 28 U.S.C. § 1491(a)(1). The CFC therefore lacks jurisdiction to hear claims against Johns Manville Corp. See id.

Plaintiff contends that because he is seeking more than $10,000 in money damages, his claim falls within the jurisdiction of the CFC. Pl.'s Mot. 4-6. Plaintiff further asserts that the court has jurisdiction over his tort claim because as a pro se plaintiff, he should be held to a less stringent standard. Id. It is true that pleadings filed by pro se plaintiffs are generally held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). Nonetheless, pro se plaintiffs must meet jurisdictional requirements. Bernard v. United States, 59 Fed. Cl. 497, 499, aff'd, 98 Fed. App'x 860 (Fed. Cir. 2004) (unpublished decision). The jurisdiction of the CFC expressly excludes all tort claims, regardless of the amount of money damages sought. 28 U.S.C. § 1491(a)(1). This limitation is jurisdictional, and even under the less stringent standards afforded a pro se plaintiff, the CFC has no jurisdiction to hear plaintiff's tort claims. See id. Because there has been no change in the applicable law, plaintiff is not entitled to reconsideration on the ground of "an intervening change in the controlling law . . . ." Matthews, 73 Fed. Cl. at 526.

B. There Is No Previously Unavailable Evidence

Plaintiff does not raise any new evidence in his Motion. See Pl.'s Mot. passim. Plaintiff reiterates the claims he raised in earlier filings: that PWC's failure to conform to OSHA rules led to plaintiff's asbestos exposure, and that PWC's negligence resulted in plaintiff's disability. Pl.'s Mot. 5-7. A party, even a pro se party, cannot prevail on a motion for reconsideration by raising an issue that was litigated, or could have been litigated at the time the complaint was filed. Matthews, 73 Fed. Cl. 525-26 (construing pro se plaintiff's pleadings liberally but nevertheless finding that a pro se plaintiff cannot prevail on reconsideration by offering previously available evidence). Plaintiff has pointed to no previously unavailable evidence that would make reconsideration appropriate.

C. Plaintiff Is Unable to Demonstrate Manifest Injustice

Plaintiff has likewise failed to demonstrate that there has been manifest injustice. There is nothing that the plaintiff points to, or that the court can discern, that approaches the requisite level of injustice needed to support reconsideration. See Pac. Gas & Elec. Co., 74 Fed. Cl. at 785. Plaintiff is dissatisfied with the result, but dissatisfaction does not warrant reconsideration. See Shirlington Limousine & Transp., Inc., 78 Fed. Cl. 27, 31 (2007); Seldovia Native Ass'n Inc., 36 Fed. Cl. at 594. Plaintiff fails to establish the

manifest injustice necessary to prevail on a motion for reconsideration. See Shirlington Limousine & Transp., Inc., 78 Fed. Cl. at 31.

IV. Conclusion

Because plaintiff's Motion for Reconsideration failed to show the occurrence of an intervening change in the controlling law, the availability of previously unavailable evidence, or the necessity of allowing the motion to prevent manifest injustice caused by a manifest error of law or mistake of fact, plaintiff's Motion is DENIED. No costs.

IT IS SO ORDERED.

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EMILY C. HEWITT
Chief Judge