

In the United States Court of Federal Claims

No. 05-1163C
(Filed: March 21, 2007)

MARSHALL KENNETH FLOWERS, *
*
Plaintiff, *
*
v. *
*
THE UNITED STATES, *
*
Defendant. *

OPINION AND ORDER ON PLAINTIFF’S MOTION FOR RECONSIDERATION

SWEENEY, Judge

Before this court is plaintiff’s “Motion for Reconsideration And/Or Motion To Certify For Interlocutory Appeal Of The March 1, 2007 Opinion And Order Under 28 USC § 1292(d)(2) [sic] Or In The Alternative To Transfer Court Non-Jurisdictional [sic] Counts To The Appropriate United States District Court Pursuant To 28 U.S.C [sic] §1631 And Motion To Amend Complaint,” filed March 13, 2007.¹ On March 1, 2007, this court dismissed plaintiff’s breach of contract allegations regarding United States savings bonds (“savings bonds”) and breach of contract allegations that relate to the shipment of plaintiff’s household goods, Counts V and VI of plaintiff’s amended complaint respectively. Thus, plaintiff seeks reconsideration of the court’s March 1, 2007 Opinion; or in the alternative, transfer of Counts V and VI to the appropriate United States District Court; and/or in the alternative, certification of Count V for interlocutory appeal; and leave of court to file a second amended complaint.

The court has carefully reviewed plaintiff’s Motion for Reconsideration, Motion to Certify for Interlocutory Appeal, and Motion to Transfer Claims, and determines that no response

¹ Plaintiff’s filing encompasses several motions. For ease of reference, the court will refer to these motions as if they were filed individually. In this Opinion and Order, the court will address plaintiff’s motion for reconsideration (“Motion for Reconsideration”); motion to certify for interlocutory appeal (“Motion to Certify for Interlocutory Appeal”), and motion to transfer Counts V and VI (“Motion to Transfer Claims”) (all page citations will reference “Pl.’s Mot. for Recons.”). Lastly, plaintiff seeks leave to file a second amended complaint (“Motion to Amend the Complaint”). Because the court requires further briefing on the Motion to Amend the Complaint, the court will await the government’s response.

from defendant is necessary on these motions. For the reasons stated below, plaintiff's Motion for Reconsideration, Motion to Certify for Interlocutory Appeal, and Motion to Transfer Claims are denied.

Plaintiff's Motion to Amend the Complaint remains before this court. Defendant shall file a response no later than March 30, 2007.

I. BACKGROUND

A complete recitation of the procedural and factual background can be found in the court's March 1, 2007 Opinion and Order ("Opinion"). See Flowers v. United States, No. 05-1163C, --- Fed. Cl. ----, 2007 WL 655513, at *2-8 (Fed. Cl. Mar. 1, 2007). In his Motion for Reconsideration, plaintiff asserts that the court misstated portions of the administrative record in the Opinion.² Pl.'s Mot. for Recons. 4, 10. As the court stated in its Opinion, the purpose of citing to the administrative record was to provide the factual and procedural background surrounding plaintiff's allegations before this court. Flowers, 2007 WL 655513, at *2 n.2.

II. DISCUSSION

A. Motion for Reconsideration

Plaintiff requests that this court reconsider its Opinion denying discovery and dismissing two of plaintiff's claims. Pl.'s Mot. for Recons. 11. Plaintiff asserts that without discovery, his

² Plaintiff asserts that the court's Opinion incorrectly recites a security guard's observations of plaintiff's theft of a computer hard drive from the Army and Air Force Exchange Service ("AAFES"). See Pl.'s Mot. for Recons. 4. The administrative record in relevant part reads:

[Sergeant Major ("SGM")] Flowers walked to the audio section and removed a Western Digital hard drive from the display shelf. SGM Flowers then walked to the front of the store, spoke to the greeting clerk, who later stated SGM Flowers told her he had left his receipt for the Western Digital hard drive in his car. SGM Flowers then exited the exchange with the hard drive. Approximately 30 seconds later, SGM Flowers re-entered the exchange with a wrinkled 'even exchange form,' at which time he was detained by AAFES security.

Administrative Record ("AR") 662. Additionally, plaintiff asserts that the Opinion incorrectly referred to Captain Peter C. Graff ("Captain Graff") as plaintiff's defense counsel. See Pl.'s Mot. for Recons. 10. The administrative record contains a copy of a memorandum to plaintiff signed by Captain Graff in his capacity as "Defense Counsel." AR 702. Further, the memorandum identifies Major Denise Lind as plaintiff's "Individual Military Counsel" and Charles Gittins as plaintiff's civilian counsel. Id. at 701.

“ability to display the integrity of a system that selectively applied and enforce [sic] the law to some worthy of constitutional protection and equality of law” has been “restrict[ed].” Id.

Rule 59 of the Rules of the United States Court of Federal Claims (“RCFC”) allows this court to grant reconsideration “to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States.” RCFC 59(a)(1); see Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990) (“The decision whether to grant reconsideration lies largely within the discretion of the [trial] court.”). “A motion for reconsideration should be considered with ‘exceptional care.’” Carter v. United States, 518 F.2d 1199, 1199 (Ct. Cl. 1975). In order to prevail on reconsideration, the movant must establish a manifest error of law or mistake of fact. Id. A motion for reconsideration “is not intended to give an unhappy litigant an additional chance to sway the court.” Bishop v. United States, 26 Cl. Ct. 281, 286 (1992) (quoting Circle K Corp. v. United States, 23 Cl. Ct. 659, 664 (1991)).

To meet his burden, plaintiff must show that: (1) an intervening change in the controlling law has occurred; (2) previously unavailable evidence is now available; or (3) relief is necessary to prevent manifest injustice. Fru-Con Const. Corp. v. United States, 44 Fed. Cl. 298, 301 (1999); see also Aerolease Long Beach v. United States, 31 Fed. Cl. 342, 376 (1994).

In its Opinion, this court denied plaintiff’s motion for discovery under RCFC 56(f) regarding the savings bonds and damage to household goods allegations. See generally Flowers, 2007 WL 655513. The court noted that in order for plaintiff to meet the standard under RCFC 56(f), plaintiff had to show the existence of a genuine issue of material fact. There is no dispute that plaintiff’s daughters, Letina Flowers and Tameca Flowers, not plaintiff, were the registered owners of the savings bonds in question. Id. at *12-13. Simply put, plaintiff lacks standing to bring an action for money damages regarding the savings bonds because he was not the registered owner. The discovery plaintiff sought could not and would not establish otherwise. Thus, summary judgment was warranted as a “matter of law.” RCFC 56(c).

Regarding the damage to household goods allegations, the court found that the applicable statute, the Military Personnel and Civilian Employees’ Claims Act (“MPCECA”), precludes this court’s review. Flowers, 2007 WL 655513, at *16. Thus, discovery in aid of a claim over which this court cannot exercise its jurisdiction is pointless and a waste of the parties’ resources. Plaintiff’s discovery requests would not have yielded any information that would alter well-established legal precedent that the MPCECA precludes judicial review over the type of claims plaintiff asserts in this court. Consequently, the court granted summary judgment in favor of defendant on Counts V and VI of plaintiff’s amended complaint. Id. at *17.

Applying the standard for reconsideration stated above, none of the factors is availing: (1) there has been no intervening change in the controlling law; (2) there has been no newly-discovered evidence; and (3) there is no risk of manifest injustice. Therefore, the court denies plaintiff’s Motion for Reconsideration.

B. Certification for Interlocutory Appeal

In the alternative, plaintiff requests that this court certify the breach of contract claim regarding the savings bonds for interlocutory appeal.³ Pl.'s Mot. for Recons. 20, 23. Plaintiff asserts that the ruling of United States District Court for the District of Hawaii ("U.S. District of Hawaii"), filed June 9, 2003, and the March 1, 2007 Opinion of this court regarding the savings bonds conflict with United States Department of Treasury regulations ("Treasury Department's Regulations" or "Regulations"). *Id.* at 20-21. To support his motion for certification of Count V for interlocutory appeal, plaintiff states that:

[Count V, the breach of contract claim regarding the savings bonds,] surely is a candidate for interlocutory appeal since there is a controlling question of law as to whether applicable [United States Department of Treasury] regulation section 353.20 (1979) or its update is applicable to the state court⁴ in rendering decision [sic] when the Government has no compelling interest in the outcome of the judicial proceedings. Without a doubt, there can be substantial grounds for differences of opinion and such certification will advance termination of litigation.

....

³ Plaintiff requests that this court "certify Count V of the amended complaint regarding the 'taking' of the savings bonds by the Government and breach of Contract [sic] for interlocutory appeal." Pl.'s Mot. for Recons. 23. However, Count V of plaintiff's amended complaint alleges solely a breach of contract claim, not a takings claim, regarding the savings bonds. It is Count IV of plaintiff's amended complaint that seeks redress for the government's alleged taking of the savings bonds. Additionally, in its March 1, 2007 Opinion, this court ruled upon Counts V and VI of plaintiff's amended complaint, not Count IV. Thus, in this opinion and order, the court only addresses whether the breach of contract claim regarding the savings bonds should be certified for interlocutory appeal.

⁴ Plaintiff references the "state court"; however, his motion discusses how the "'U.S. District Court, State of Hawaii' dismissed plaintiff's claim holding that the court lacked jurisdiction pertaining to the \$10,000.00 bond." Pl.'s Mot. for Recons. 20-21. The U.S. District Court of Hawaii ruled that it lacked jurisdiction over the savings bond valued in excess of \$10,000. Thus, the court construes plaintiff's assertion as a reference to the June 9, 2003 decision of the U.S. District Court of Hawaii, rather than the decision by the state court, Circuit Court of the First Circuit, State of Hawaii, which granted plaintiff default judgment against his daughters.

Both this Court and the U.S. District Court State of Hawaii conflicts [sic] with federal law established by the bureau⁵ and must be resolved to terminate the litigation.

Id. at 20-21 (footnotes added).

Regarding interlocutory appeals, 28 U.S.C. § 1292(d)(2) provides, in relevant part:

When the chief judge of the United States Court of Federal Claims issues an order under section 798(d) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

28 U.S.C. § 1292(d)(2) (2000). It is well-established that interlocutory appeals are reserved for “exceptional” or “rare” cases and should be allowed only with great care. See Caterpillar Inc. v. Lewis, 519 U.S. 61, 74 (1996) (citations omitted); see also AD Global Fund, LLC ex rel. N. Hills Holding, Inc. v. United States, 68 Fed. Cl. 663, 665 (2005); Testwuide v. United States, 56 Fed. Cl. 755, 766 (2003). An interlocutory appeal is permitted “‘only in exceptional cases’ so to avoid unnecessary delay and expense as well as piecemeal litigation.” Northrop Corp. v. United States, 27 Fed. Cl. 795, 799 (1993) (citation omitted); see also Klamath Irr. Dist. v. United States, 69 Fed. Cl. 160, 162 (2005).

Section 1292(d)(2) provides a three-pronged test for certification: (1) there must be a “controlling question of law . . . involved”; (2) there must be a “substantial ground for difference of opinion” regarding that controlling question of law; and (3) “immediate appeal . . . may materially advance the ultimate termination of the litigation” See Aleut Tribe v. United States, 702 F.2d 1015, 1019 (Fed. Cir. 1983); Jade Trading, LLC v. United States, 65 Fed. Cl. 443, 446 (2005). This standard “is ‘virtually identical’ to the statutory standard of certification utilized by the United States district courts [under 28 U.S.C. § 1292(b)].” Am. Mgmt. Sys., Inc. v. United States, 57 Fed. Cl. 275, 276 (2003); see also United States v. Connolly, 716 F.2d 882, 885 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065 (1984). The decision whether to certify an appeal is committed to the sound discretion of the trial judge. See Arthur Young & Co. v. U.S. Dist. Court, 549 F.2d 686, 698 (9th Cir. 1977); D’Ippolito v. Cities Serv. Co., 374 F.2d 643, 649 (2nd Cir. 1967).

⁵ The court construes plaintiff’s reference to the “bureau” to mean the Bureau of Public Debt, a division within the Department of Treasury.

The first criterion requires that the decision must involve “a controlling question of law.” 28 U.S.C. § 1292(d)(2). A question is “controlling” if it “materially affect[s] issues remaining to be decided in the trial court.” Marriott Int’l Resorts v. United States, 63 Fed. Cl. 144, 145 (2004); see also Klamath, 69 Fed. Cl. at 162; Jade Trading, 65 Fed. Cl. at 447; Pikes Peak Family Housing, LLC v. United States, 40 Fed. Cl. 673, 686 (1998). In the case sub judice, there is no “controlling question of law.” Other issues remain and require adjudication. As the court reasoned in Klamath, “[t]he situation presented . . . does not involve a question of jurisdiction, limitations or the like, upon which an appellate court ruling could lead either to the resolution of the entire case or even the streamlining of further proceedings.” 69 Fed. Cl. at 162. Accordingly, the court determines that the first element for interlocutory appeal has not been satisfied.

The second criterion concerns whether “there is a substantial ground for difference of opinion” on the controlling question of law. 28 U.S.C. § 1292(d)(2). As described in Klamath:

The Federal Circuit has held that one basis for this “substantial ground” may be two different, but plausible, interpretations of a line of cases. More often, however, this criterion manifests itself as splits among the circuit courts, an intracircuit conflict, or a conflict between an earlier circuit precedent and a later Supreme Court case, or, at very least, a substantial difference of opinion among judges of this court.

69 Fed. Cl. at 163 (citation omitted); see also Vereda, Ltda. v. United States, 271 F.3d 1367, 1373-74 (Fed. Cir. 2001).

In the case sub judice, there is no “substantial ground for difference” regarding plaintiff’s breach of contract claim for the savings bonds. First, as explained in this court’s Opinion, it is well-established that the interpretation of the pertinent Treasury Department’s Regulations regarding savings bonds is a matter of federal law. Flowers, 2007 WL 655513, at *12. The court held in its Opinion that the Treasury Department’s Regulations, not a state court default judgment, control. Id. Both the decision of the U.S. District Court of Hawaii and this court’s Opinion applied the pertinent Regulations to plaintiff’s breach of contract claims regarding the savings bonds. To be sure, the U.S. District Court of Hawaii, regarding all of the savings bonds except the one valued in excess of \$10,000, found that plaintiff was not the registered owner of the bonds. Thus, that court ruled that plaintiff did not have standing to sue for those bonds. As to the savings bond valued in excess of \$10,000, the U.S. District Court of Hawaii determined that it did not have jurisdiction pursuant to the Little Tucker Act.⁶ Based upon reasoning

⁶ The Little Tucker Act, 28 U.S.C. § 1346(a)(2) (2000), provides:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any

identical to that applied by the U.S. District Court of Hawaii, this court found that plaintiff lacked standing to sue because he was not the registered owner of the savings bonds, including the savings bond valued in excess of \$10,000. The analysis and reasoning of the two courts are in accord. There is no “substantial ground for difference of opinion” that the Treasury Department’s Regulations apply. 28 U.S.C. § 1292(d)(2). Thus, the second prong has not been met.

Finally, the court must consider whether certification of the controlling legal issue “may materially advance the ultimate termination of the litigation.” *Id.* The court must carefully analyze the impact that an interlocutory appeal would have on the remaining litigation and only allow certification when appropriate. For example, certification is appropriate when the court determines that the resolution of the issue certified for interlocutory appeal could result in the “entire lawsuit . . . be[ing] dismissed” *Vereda*, 271 F.3d at 1374; see also *AD Global Fund*, 68 Fed. Cl. at 666 (ruling that interlocutory appeal would materially advance the litigation because reversal of the trial court ruling would terminate the litigation, potentially saving 18 months of discovery and pre-trial preparation). Further, the court should certify a question for interlocutory appeal when resolution of the issue would materially advance the termination of other claims pending before the Court of Federal Claims. See *Triax Co. v. United States*, 20 Cl. Ct. 507, 514 (1990) (determining an interlocutory appeal would materially advance the litigation because reversal of the trial court would resolve the case and a large number of other cases).

If the court were to certify plaintiff’s claim, the policies behind interlocutory appeal, judicial efficiency and avoiding piecemeal litigation, would be severely hindered. See *Pause Tech. LLC v. TiVo*, 401 F.3d 1290, 1292-93 (Fed. Cir. 2005) (“By requiring parties to ‘raise all claims of error in a single appeal following final judgment on the merits,’ . . . [Congress has designed a structure that], ‘forbid[s] piecemeal disposition on appeal of what for practical purposes is a single controversy’”). Therefore, certification of an interlocutory appeal will not materially advance the resolution of this litigation. Plaintiff’s Motion to Certify for Interlocutory Appeal is denied.

C. Plaintiff’s Request to Transfer Counts V and VI

Plaintiff alternatively asks this court to “transfer dismissed counts V and VI, if appropriate, to the appropriate United States District Court” pursuant to 28 U.S.C. §1631. Pl.’s

express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort

For claims exceeding \$10,000, the United States Court of Federal Claims (“Court of Federal Claims”) has exclusive jurisdiction, “unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.” *Clinton v. Goldsmith*, 526 U.S. 529, 539 (1999); *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998).

Mot. for Recons. 2. Section 1631 of Title 28 provides:

Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631 (2000).

Transfer is appropriate when the following elements are satisfied: (1) the transferring court lacks subject matter jurisdiction; (2) the case could have been filed in the court receiving the transfer; and (3) the transfer is in the interest of justice. Id.

In the case sub judice, the court has ruled on Counts V and VI of plaintiff's amended complaint by granting summary judgment in favor of defendant. Flowers, 2007 WL 655513, at *17. Before the court ruled on defendant's Motion for Summary Judgment and plaintiff's Motion for Discovery, the court could have transferred these two claims if it had been appropriate under the standard set forth in 28 U.S.C. § 1631. However, the court found that summary judgment was appropriate; thus, the court granted defendant's motion on Counts V and VI of plaintiff's amended complaint. Because the court has already disposed of Counts V and VI, plaintiff's motion to transfer Counts V and VI is denied as moot. However, the court notes that transferring Counts V and VI would not have been appropriate. It is pointless to transfer plaintiff's savings bonds ownership claim to the district court because plaintiff already has litigated that precise issue in that same court.⁷ Additionally, as explained above, the MPCECA precludes judicial review of certain military claims, including those set forth in Count VI of plaintiff's complaint. Thus, plaintiff has not met his burden under 28 U.S.C. § 1631; his Motion to Transfer Claims is denied.

⁷ As noted above and in the court's March 1, 2007 Opinion, the U.S. District Court of Hawaii disposed of plaintiff's claim for breach of contract regarding all of the savings bonds claims except for the bond valued in excess of \$10,000. Flowers, 2007 WL 655513, at *13. Regarding the savings bond valued in excess of \$10,000, the U.S. District Court of Hawaii found that the Court of Federal Claims had exclusive jurisdiction. Id. at *7. Plaintiff's amended complaint before this court asserted a claim for breach of contract regarding all of the savings bonds, including the bond valued in excess of \$10,000. In its Opinion, this court found that plaintiff lacked standing to maintain an action for money damages for the alleged loss of the savings bonds. Id. at *13. Further, this court determined that the doctrine of issue preclusion prevented plaintiff from relitigating the savings bonds claims previously adjudicated by the U.S. District Court of Hawaii. Id. at *14.

III. CONCLUSION

For the reasons stated above:

1. Plaintiff's Motion for Reconsideration is **DENIED**.
2. Plaintiff's Motion to Certify for Interlocutory Appeal pursuant to 28 U.S.C. § 1292(d)(2) is **DENIED**.
3. Plaintiff's Motion to Transfer Claims pursuant to 28 U.S.C. § 1631 is **DENIED** as moot.
4. Defendant shall file a response to plaintiff's Motion to Amend the Complaint **no later than Friday, March 30, 2007**.
5. The court grants plaintiff's request for enlargement of time to file his response to defendant's Motion to Dismiss, or in the Alternative, for Judgment on the Administrative Record with respect to Counts I-IV of the amended complaint. Plaintiff shall file his response to defendant's Motion to Dismiss **no later than Monday, April 16, 2007**. Defendant shall file a reply in accordance with RCFC 7.2(c), 14 days after service of the response.

IT IS SO ORDERED.

MARGARET M. SWEENEY
Judge