

In the United States Court of Federal Claims

No. 05-1205 C
(Filed: April 24, 2012)

NELSON CONSTRUCTION COMPANY *
and KARIN NELSON, *
*
Plaintiffs, *
*
v. *
*
THE UNITED STATES, *
*
Defendant. *

RULING ON PLAINTIFFS' MOTIONS (1) TO DISMISS COUNTERCLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION, (2) TO STRIKE PARAGRAPHS 57-59 OF DEFENDANT'S COUNTERCLAIMS, AND (3) FOR ORAL ARGUMENT ON THE MOTION TO DISMISS

Before the court are plaintiffs' motion to dismiss counterclaims for lack of subject matter jurisdiction ("motion to dismiss"), plaintiffs' motion to strike three paragraphs of defendant's counterclaims ("motion to strike"),¹ and plaintiffs' motion for oral argument on their motion to dismiss ("motion for oral argument").² In their motion to dismiss, plaintiffs argue that the court lacks subject matter jurisdiction over defendant's counterclaims, which are brought under the False Claims Act, 31 U.S.C. § 3729-3733 (2006), and the Special Plea in Fraud statute, 28 U.S.C. § 2514 (2006), because (1) the court previously dismissed Counts I and II of the amended complaint for lack of subject matter jurisdiction and (2) plaintiffs voluntarily dismissed with prejudice Count III of the amended complaint. In their motion to strike, plaintiffs argue that three paragraphs in defendant's counterclaims are opinions, allegations, arguments, and conclusions of law that the court cannot consider on an RCFC 12(b)(1) motion. Defendant asserts that the court possesses jurisdiction over its counterclaims based upon the court's jurisdiction over Count III and opposes plaintiffs' motion to strike on the ground that no justification exists to strike the allegations at issue.

¹ Plaintiffs incorporated the motion to strike into a reply brief in support of their motion to dismiss.

² Although parties may request oral argument, see RCFC 20(c), the court deems the issues presented in plaintiffs' motion to dismiss straightforward such that oral argument is unnecessary. Accordingly, plaintiffs' motion for oral argument is denied.

The court previously recited the facts giving rise to this litigation in Nelson Construction Co. v. United States, 79 Fed. Cl. 81, 82-84 (2007). Plaintiffs filed a complaint in the United States Court of Federal Claims (“Court of Federal Claims”) asserting two claims for relief: “wrongful payment” in Count I and “equitable subrogation” in Count II. Compl. ¶¶ 21-27. Defendant moved to dismiss the complaint for lack of subject matter jurisdiction. During oral argument on defendant’s motion to dismiss, plaintiffs advanced an additional legal theory—intended third-party beneficiary status—that they never pled in the complaint. The court then granted plaintiffs’ request to file an amended complaint. Nelson Constr. Co., 79 Fed. Cl. at 84 ; see also Am. Compl. ¶¶ 37-41 (alleging in Count III entitlement to recovery based upon an intended third-party beneficiary theory). Thereafter, defendant moved to dismiss Count III for lack of subject matter jurisdiction, arguing that Nelson Construction Co. (“Nelson”) was not the intended beneficiary of the contract. See Def.’s Mot. Dismiss Count Three Am. Compl. 5-6.

The court determined that it lacked subject matter jurisdiction over and dismissed Counts I and II. Nelson Constr. Co., 79 Fed. Cl. at 87-93. It rejected defendant’s jurisdictional challenge with respect to Count III. Id. at 96-99. Thereafter, defendant moved to amend its answer and to assert affirmative defenses and counterclaims based upon the False Claims Act and 28 U.S.C. § 2514.³ Over plaintiffs’ objection, the court granted defendant’s motion to amend.

During the course of discovery, plaintiffs moved to voluntarily dismiss with prejudice Count III. Defendant consented to plaintiffs’ motion on the condition that its counterclaims remained pending for independent adjudication. The court, pursuant to RCFC 54(b), granted plaintiffs’ motion to voluntarily dismiss with prejudice Count III. Judgment was entered with respect to Count III, and defendant’s counterclaims remained pending. Plaintiff’s motion to dismiss followed.

I. MOTION TO DISMISS

In their motion to dismiss, plaintiffs focus primarily upon the court’s determination that it lacked jurisdiction over Counts I and II, arguing that defendant “attempts to refute its clear admissions in the pleadings and seeks to reverse and overrule the basis of this Court’s Opinion and Order dismissing Counts One and Two of Nelson’s claims based on lack of jurisdiction.” Pls.’ Mem. Supp. Pls.’ Mot. Dismiss Countercls. 12. Counts I and II, however, do not bear on the issue of whether the court has jurisdiction over defendant’s counterclaims. Inexplicably absent from plaintiffs’ motion and memorandum in support thereof is any reference to Count III, over which the court determined that it possessed jurisdiction.

³ A counterclaim, by definition, is a “claim for relief asserted against an opposing party after an original claim has been made.” Black’s Law Dictionary 353 (7th ed. 1999). A defendant “does not ‘institute’ an action when he asserts a counterclaim. Rather, a plaintiff must commence the action by filing a complaint that names a defendant.” Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n, AFL-CIO v. Pelella, 350 F.3d 73, 82 (2d Cir. 2003).

Instead, plaintiffs first mention Count III in a reply to defendant's sur-reply brief:

Having already dismissed Plaintiffs['] . . . Counts I and II, this Court stated with regard to the remaining Count III, in its opinion and order dated October 29, 2007, that [defendant's] argument for dismissal was 'compelling' but that the Court was precluded from immediately dismissing Count III due to the Court's obligation to accept as true Plaintiffs' well pled allegations regarding third party beneficiary status. However, at the same time this Court invited Defendant . . . to contest Count III . . . through summary judgment, by stating in its order that nothing 'precludes defendant from moving for summary judgment and countering plaintiff's averments with documents and affidavits.'

Subsequent to the Court's Opinion and Order, motion pleading in this matter included the affidavit of Plaintiffs' then attorney . . . , which, quite frankly, constitutes the proof which this Court invited . . . , which contradicts Plaintiffs' Count III allegations with respect to third party beneficiary status.⁴

Pls.' Reply Def.'s Sur-Reply 2-3 (footnote added) (citation omitted). In effect, plaintiffs note the existence of evidence that could have entitled defendant to summary judgment on Count III. A party's likelihood of prevailing on the merits of Count III, much like the court's dismissal of Counts I and II, is ultimately irrelevant to the question of whether the court possesses jurisdiction over defendant's counterclaims.⁵

Defendant relies upon two decisions—Joseph Morton Co. v. United States, 3 Cl. Ct. 780 (1983), and Daff v. United States, 78 F.3d 1566 (Fed. Cir. 1996)—in support of its argument that the court possesses jurisdiction over its counterclaims. In Joseph Morton Co., the plaintiff filed a complaint against the government under the Contract Disputes Act of 1978 ("CDA"). 3 Cl. Ct. at 783. The court issued a decision sustaining the default termination of plaintiff's right to perform the contract at issue, a decision the plaintiff construed as a dismissal of its complaint. Id. at 781-82. It did not enter judgment in order to permit briefing on the issue of whether the

⁴ An exhibit attached to plaintiffs' reply to defendant's sur-reply contains a letter from defendant's former counsel to plaintiffs' former counsel pertaining to plaintiffs' settlement offer and a potential settlement recommendation by defendant's former counsel. Pls.' Reply Mem. Resp. Def.'s Sur-Reply & Supp. Mot. Dismiss Countercls. ("Pls.' Reply Def.'s Sur-Reply") Ex. A. The parties dispute whether the letter falls within or without the scope of Federal Rule of Evidence 408. Since the letter bears no relevance upon the jurisdictional inquiry, the court need not—and does not—consider it.

⁵ Defendant notes that plaintiffs' argument serves as an "acknowledgment that the Court did have jurisdiction over [Count III], as summary judgment on the claim would not be possible unless the Court had jurisdiction over it. . . . A court can only render a merits decision, including a summary judgment decision, if it possesses jurisdiction over the claim." Def.'s Resp. Pls.' Reply Mem. Resp. Def.'s Sur-Reply & Supp. Mot. Dismiss Countercls. 2-3.

government's proposed counterclaims for excess procurement costs and for breach of contract could or should be asserted in the case. Id. at 781-82. Thereafter, the United States moved for leave to amend its answer and assert counterclaims. Id. at 781. The plaintiff opposed the government's motion, arguing that "no counterclaim may be filed absent an extant complaint in this court." Id. at 782. The court rejected the plaintiff's argument, explaining that counterclaim jurisdiction "requires, as a prerequisite, the existence of a claim filed against the United States within the jurisdiction of the Claims Court." Id. at 782. It observed: "[I]f it is determined that a complaint filed in the Claims Court does not state a claim within the limited jurisdiction provided to this court, the dismissal of the complaint for lack of jurisdiction carries with it the dismissal of any counterclaim filed in the matter by the United States." Id. (citing Mulholland v. United States, 361 F.2d 237, 245 (Ct. Cl. 1966)). The court explained that the plaintiff filed a complaint setting forth a CDA claim, which fell within the court's jurisdiction. Id. at 783. Consequently, the court determined, jurisdiction existed over the counterclaims: "The fact that it has been concluded that plaintiff's pleaded contract claim is not meritorious does not deprive the Claims Court of counterclaim jurisdiction in this matter under 28 U.S.C. §§ 1503, 2508." Id.

The United States Court of Appeals for the Federal Circuit ("Federal Circuit") reached the same conclusion in Daff. There, the plaintiff, a trustee in bankruptcy for the contractor, brought a claim under the CDA. 78 F.3d at 1570. The government alleged as an affirmative defense that the plaintiff's claims were barred by "fraud and illegality" and asserted two counterclaims, one for unliquidated progress payments and one under the False Claims Act. Id. The Court of Federal Claims rejected the plaintiff's argument that the court lacked jurisdiction based upon deficiencies in the contracting officer's decision terminating the contract and, on the merits, upheld the termination for default. Id. It then entered judgment in favor of the government on its counterclaims. Id. On appeal, the plaintiff argued that the Court of Federal Claims was without jurisdiction to entertain its claims and the government's counterclaims because, among other reasons, plaintiff never received a cure notice, thereby rendering the default termination defective. Id. at 1572. Affirming the trial court's jurisdictional determination, the Federal Circuit explained that "the error of terminating the contract for default without issuing a cure notice would not have any effect on CDA jurisdiction." Id. at 1573; see also id. ("That a default termination may be improper as a matter of government contract law has no bearing on the jurisdiction of the tribunal hearing the case under the CDA.") Accordingly, it concluded that "[b]ecause the Court of Federal Claims had jurisdiction to hear [the plaintiff's] challenge to the termination for default, it had jurisdiction to adjudicate the government's counterclaims." Id.; accord id. at 1575.

Plaintiffs attempt to distinguish Joseph Morton Co. and Daff by emphasizing that both cases, unlike the case sub judice, involved CDA claims asserted by contractors and counterclaims brought against contractors.⁶ Pls.' Reply Def.'s Opp'n Dismiss Countercls. ("Pls.' Reply") 7; see also id. at 4-5 (emphasizing that Nelson was a "subcontractor"). Thus, plaintiffs contend, "[n]either case dealt with similar facts nor law applicable to those before the Court in the instant

⁶ Ironically, plaintiffs commit a "gaffe" by repeatedly referring to the Federal Circuit's decision in Daff as "Gaff" throughout their reply brief.

case.” Id. Ultimately, Nelson’s status as a subcontractor is not relevant, and, to the extent Joseph Morton Co. and Daff are factually distinguishable from this case, those distinctions have no bearing upon the court’s jurisdictional inquiry. Nothing in Joseph Morton Co. and Daff suggests that the jurisdictional principles enunciated therein are limited to cases involving CDA claims. To the contrary, Joseph Morton Co. and Daff, the latter of which constitutes binding Federal Circuit precedent, see Coltec Indus. v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (explaining that the Court of Federal Claims “is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims”), stand for the general proposition that counterclaims asserted by the government against a plaintiff fall within the court’s jurisdiction if the court possesses jurisdiction over the plaintiff’s claim to which the counterclaims are addressed.

Defendant filed its counterclaims in response to Count III, which constituted the only surviving claim following dismissal of Counts I and II. Plaintiffs asserted a third-party beneficiary claim in Count III. The Court of Federal Claims possesses jurisdiction over third-party beneficiary claims, see First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1289 (Fed. Cir. 1999) (recognizing an exception to the privity of contract requirement in suits against the government by intended third-party beneficiaries), and the court previously concluded that plaintiffs met their burden of establishing subject matter jurisdiction with respect to Count III, Nelson Constr. Co., 79 Fed. Cl. at 96-99. The parties never raised any further issue concerning the court’s jurisdictional determination with respect to Count III, and the court found no reason to revisit that determination while Count III remained pending before the court. Furthermore, plaintiffs never objected to defendant’s conditional consent to its motion to voluntarily dismiss with prejudice Count III.⁷

“Parties, of course, cannot confer jurisdiction” upon the court, Weinberger v. Bentex Pharm., Inc., 412 U.S. 645, 652 (1973), and, similarly, parties cannot divest the court of its jurisdiction, see Commc’n Workers of Am., AFL-CIO v. Am. Tel. & Tel. Co., 932 F.2d 199, 210 (3d Cir. 1991) (“A private agreement between parties cannot divest the district court of jurisdiction granted by Congress; it can only limit the parties’ rights to invoke the court’s jurisdiction.”). Since the court possessed jurisdiction over Count III, the court possesses jurisdiction over defendant’s counterclaims, which remained pending following plaintiffs’ voluntary dismissal with prejudice of Count III. The court’s dismissal of Count III does not divest the court of jurisdiction over defendant’s counterclaims. See Daff, 78 F.3d at 1573; Joseph Morton Co., 3 Cl. Ct. at 782-83. Because plaintiffs’ jurisdictional challenge is without merit, their motion to dismiss is denied.⁸

⁷ A dismissal with prejudice constitutes a judgment on the merits for purposes of claim preclusion. Pactiv Corp. v. Down Chem. Co., 449 F.3d 1227, 1230 (Fed. Cir. 2006).

⁸ Plaintiffs’ remaining arguments urging dismissal for lack of jurisdiction based upon the law of the case doctrine and judicial estoppel are inapplicable and need not be addressed.

II. MOTION TO STRIKE

Plaintiffs also argue that the court must strike three paragraphs set forth in defendant's counterclaims because they constitute "opinions, allegations, arguments and conclusions of law" that cannot be considered by the court when ruling upon an RCFC 12(b)(1) motion. Pls.' Reply 2. The allegations set forth in defendant's counterclaims are not relevant to the court's jurisdictional inquiry. Plaintiffs offer no justification for striking defendant's allegations, which address the merits of its counterclaims. Accordingly, plaintiffs' motion to strike is denied.

III. CONCLUSION

For the foregoing reasons, defendant's motion for oral argument is **DENIED**, defendant's motion to dismiss is **DENIED**, and defendant's motion to strike is **DENIED**.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge