

In the United States Court of Federal Claims

No. 11-543C

(Filed: June 19, 2012)

LONE STAR INDUSTRIES, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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**MEMORANDUM OPINION AND ORDER DENYING
DEFENDANT’S MOTION TO DISMISS WITHOUT PREJUDICE**

Plaintiff, Lone Star Industries, Inc. (“Lone Star”) claims that the Government effected a Fifth Amendment taking of its property by building a rock dike across a navigable waterway -- the Mississippi River-Gulf Outlet (“MRGO”) -- permanently blocking the waterway and preventing deep draft ships from accessing Plaintiff’s offshore marine import terminal and manufacturing facility.

This matter comes before the Court on Defendant’s motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff opposes the motion and, in the alternative, seeks leave to file an amended complaint to clarify allegations regarding its claimed property right. Pl.’s Opp’n at 28. Because the Court grants Plaintiff leave to file an amended complaint, the Court denies Defendant’s motion to dismiss without prejudice.

Background¹

On March 29, 1956, Congress approved construction of the MRGO, a 76-mile, man-made navigation channel running northwest from the Gulf of Mexico to the Port of New Orleans. Prior to construction of the MRGO, deep draft vessels could reach New Orleans only by traveling 90 miles up the Mississippi River from the Gulf. The MRGO, which was completed in 1968, reduced that distance by over 50 river miles. A shallower channel that cannot

¹ This background is derived from the Complaint and the parties’ motion papers and should not be construed as findings of fact.

accommodate deep draft vessels, the Gulf Intracoastal Waterway (“GIWW”), runs west from the Gulf of Mexico and intersects the MRGO near the MRGO’s northern terminus. East of this intersection, the Michoud Canal runs north from the GIWW before terminating in New Orleans. The GIWW connects to the Mississippi River via the Inner Harbor Navigation Canal, which is too narrow to accommodate deep draft vessels.

The MRGO was authorized to be dredged to a depth of 36 feet. In 2005, Hurricane Katrina caused massive shoaling in the channel, limiting the MRGO to a depth of 22 feet. In 2006, Congress passed the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, Pub. L. No. 109-234, 120 Stat. 418, Ch. 3, which provided that “the Secretary of the Army, acting through the Chief of Engineers . . . shall develop a comprehensive plan, at full Federal expense, to deauthorize deep draft navigation on the [MRGO], extending from the Gulf of Mexico to the [GIWW].” In 2007, the Water Resource Development Act, Pub. L. No. 110-114, 121 Stat. 1041, § 3082, provided that submission of the plan to de-authorize deep draft navigation would trigger de-authorization, and further provided the Secretary of the Army with authority to close the MRGO. The Act also stated:

There is authorized to be appropriated to the Assistant Secretary for Economic Development (referred to in this section as the “Assistant Secretary”) \$75,000,000, to remain available until expended, to support the relocation of Port of New Orleans deep draft facilities from the [MRGO] (referred to in this section as the “Outlet”), the [GIWW], and the Inner Harbor Navigation Canal to the Mississippi River.

...

There is authorized to be appropriated to the Assistant Secretary \$85,000,000, to remain available until expended, to provide assistance pursuant to sections 209(c)(2) and 703 of the Public Works and Economic Development Act of 1965 (42 U.S.C. 3149(c)(2), 3233) to one or more eligible recipients under such Act to establish revolving loan funds to make loans for terms up to 20 years at or below market interest rates (including interest-free loans) to private businesses within the Port of New Orleans that may need to relocate to the Mississippi River within the State of Louisiana due to the treatment of [the MRGO] under title VII of this Act.

As of this date, these funds have yet to be appropriated.

In 2008, the Army Corps of Engineers submitted a “(Revised) Integrated Final Report to Congress and Legislative Environmental Impact Statement,” triggering de-authorization of the MRGO. The Corps subsequently contracted with Pine Bluff Sand and Gravel Company to deposit 430,000 tons of rock directly across the channel, a project that was completed by August, 2009. The finished rock dike makes it impossible for deep draft vessels to enter the MRGO.

Lone Star, an importer of cement, owns a deep draft terminal abutting the Michoud Canal. Water access to the MRGO from Plaintiff’s property was by way of the Canal, and then

the GIWW. Lone Star was the largest user of the MRGO on a tonnage basis, and had invested approximately \$100 million in a deep-draft import terminal and manufacturing facility.

Plaintiff filed a complaint in this Court on August 29, 2011, arguing that the Government, by excluding deep draft vessels from Lone Star's import facility, took Plaintiff's real estate and improvements worth at least \$64,480,800. Plaintiff alleged that because of the MRGO's closure, "Lone Star will never again receive any deep draft ships at its deep draft facility." Compl. ¶ 17. Plaintiff claims that "even if funds for relocation might actually be appropriated by the Congress, Lone Star's Michoud Canal facilities, including many of the improvements thereon, are permanent and not susceptible to relocation." Resp. 6-7.

Discussion

When deciding a motion to dismiss under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the Court considers whether the pleadings satisfy RCFC 8. Pursuant to RCFC 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2); Gay v. United States, 93 Fed. Cl. 681, 685 n.3 (2010); see generally Ashcroft v. Iqbal, 556 U.S. 662 (2009) (construing Rule 8 of the Federal Rules of Civil Procedure, which is identical to RCFC 8). Although RCFC 8 does not require detailed factual allegations, it does demand more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

To survive a motion to dismiss under RCFC 12(b)(6), the complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; see also Iqbal, 556 U.S. at 678. To determine whether a complaint states a plausible claim for relief, a court must engage in a context-specific analysis and "draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly, 550 U.S. at 555).

This case is not ripe for disposition under Defendant's pending RCFC 12(b)(6) motion because the allegations and legal theories in the Complaint need to be clarified. Indeed, Plaintiff acknowledged as much by requesting leave to amend its complaint "if the court is of the view that Lone Star should plead, additional specific facts pertaining to the particulars of its property interest that has been affected by the government's action" Pl.'s Opp'n. at 28. The Court agrees that such additional pleading is necessary and directs Plaintiff to clarify its Complaint in several respects. Plaintiff shall clarify what its property interest was; whether it is claiming a physical, regulatory, or hybrid taking; whether Plaintiff is claiming that the Water Resource Development Act confers a separate cause of action for monetary damages, independent of its taking claim² and whether it is raising such a claim in the alternative to its taking claim; what

² Plaintiff has alleged that the Water Resource Development Act authorized \$160 million to compensate users of the MRGO. Compl. ¶ 12. The Act authorized \$75 million to "support

governmental actions enticed Plaintiff to invest in improvements of almost \$64.5 million; and what governmental actions led Plaintiff to conclude that the MRGO would remain a deep draft navigation outlet.

In addition, Plaintiff shall clarify the following allegation:

The economic damage caused by permanently blocking the MRGO is exacerbated by the lack of progress in constructing the new IHNC Lock. The closure of the MRGO to navigation would be less onerous if the new IHNC Lock were completed prior to such closure. While it appears clear that this will not happen it is unconscionable that the corps would not vigorously support expediting lock construction as part of its recommendation for the MRGO.

Compl. ¶ 10(c). Plaintiff's reference to the "new IHNC Lock" is unclear, as are Plaintiff's allegations regarding this Lock, in particular whether the federal Government is constructing the new IHNC Lock and if so, pursuant to what authority, and for what purpose. As the parties' motion papers suggest, this case may implicate complex issues such as the navigational servitude doctrine and possibly state law riparian rights. As such, amplification and clarification of the complaint should facilitate the ultimate resolution of this matter.

Further, if, in litigating the amended complaint, the parties introduce matters outside the pleadings, the Court will convert Defendant's motion to dismiss to a motion for summary judgment pursuant to RCFC 12(d).³ See Easter v. United States, 575 F.3d 1332, 1335 (Fed. Cir. 2009) ("Like the equivalent Federal Rule of Civil Procedure . . . RCFC 12(d) allows a court to treat a motion to dismiss for failure to state a claim as a summary judgment motion if 'matters outside the pleadings are presented to and not excluded by the court.'). If the Court proceeds in that fashion, the Court will follow Rule 12(d)'s cautionary provision that "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the [summary judgment] motion."

Conclusion

Defendant's Motion to Dismiss is **DENIED WITHOUT PREJUDICE**.

The Court **GRANTS** Plaintiff leave to file an amended complaint. Plaintiff shall file its amended complaint within 21 days of the issuance of this order -- on or before **July 10, 2012**.

the relocation of the Port of New Orleans deep draft facilities" and \$85 million to "establish revolving loan funds to make loans . . . to private businesses within the Port of New Orleans that may need to relocate to the Mississippi River" Pub. L. No. 110-114, 121 Stat. 1041, §§ 3082(a)(1) and 3082(b). Plaintiff appears to contend that this Act was violated because no funds have yet been appropriated.

³ Defendant attached two exhibits to the motion sub judice -- Exhibit A, "Integrated Final Report to Congress and Legislative Environmental Impact Statement (Excerpt)," and Exhibit B, "Maps of the Mississippi River Gulf Outlet and Surrounding Area."

In its amended complaint, Plaintiff shall:

- a) Articulate the compensable property interest that it is asserting in its takings claim;
- b) Clarify the legal parameters of its takings claim;
- c) Clarify whether in addition to its Fifth Amendment claim, it is asserting a separate and distinct claim alleging a violation of the Water Resources Development Act of 2007, including whether that Act is money-mandating;
- d) Identify what governmental actions enticed Plaintiff to invest in improvements of almost \$64.5 million;
- e) Identify what governmental actions led Plaintiff to conclude that the MRGO would remain a deep-draft navigation outlet; and
- f) Clarify its allegations and any claim regarding the IHNC Lock.⁴

On **July 27, 2012**, at **2:00 p.m.** the Court will convene a telephonic status conference with the parties in this case to discuss further proceedings, following receipt of the amended complaint.

s/Mary Ellen Coster Williams

MARY ELLEN COSTER WILLIAMS

Judge

⁴ These questions about Plaintiff's claim should be taken as illustrative, not exhaustive -- Plaintiff should clarify and amend its complaint as it deems appropriate.