

In the United States Court of Federal Claims

No. 11-170C
(Filed: March 8, 2012)
(Not for Publication)

FILED

MAR 8 2012

U.S. COURT OF
FEDERAL CLAIMS

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DERRIC E. THOMPSON,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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ORDER OF DISMISSAL

WILLIAMS, Judge

This matter comes before the Court on Defendant's Motion to Dismiss the Complaint filed by Plaintiff pro se. For the reasons that follow, the Court dismisses the Complaint due to Plaintiff's failure to prosecute pursuant to Rule 41(b) of the Rules of the United States Court of Federal Claims ("RCFC").

Background

On March 17, 2011, Plaintiff Derric E. Thompson, who is incarcerated in a Florida State correctional institute,1 filed a "Criminal Complaint 'Affidavit'" with this Court. By Order dated May 26, 2011, the Court construed Plaintiff's filing as a Complaint and ordered Defendant to respond. Plaintiff alleges that the Florida authorities who prosecuted and incarcerated Plaintiff did so illegally, committed "commercial crimes," defrauded the State of Florida and the United States, and embezzled funds in violation of the False Claims Act, 31 U.S.C. §§ 3729-3733 (2006), thereby committing criminal acts in violation of Title 18 of the United States Code. See Compl. 1-4.

On July 26, 2011, Defendant filed a Motion to Dismiss pursuant to RCFC 12(b)(1) and 12(b)(6). Defendant argues that because Plaintiff's Complaint asserts claims against Florida

1 Plaintiff's mailing address is located at the Apalachee Correctional Institution East, Sneads, Florida.

officials, and not the United States, this Court lacks jurisdiction to hear Plaintiff's claim. Def.'s Mot. 5-6. Defendant also notes that Plaintiff has previously filed an almost identical complaint with the Court of Federal Claims, which was dismissed for lack of jurisdiction, and that the instant action is barred under principles of issue preclusion. Def.'s Mot. 6-8; see Order, Derric Emil Thompson v. United States, No. 11-81C (Fed. Cl. Feb. 11, 2011).

Although Plaintiff's response to Defendant's Motion to Dismiss was due by August 26, 2011, Plaintiff failed to file any response. On September 14, 2011, this Court ordered Plaintiff to respond to Defendant's Motion on or before October 13, 2011. The Court informed Plaintiff that if he failed to respond, the Court would issue an order requiring Plaintiff to show cause why this action should not be dismissed for failure to prosecute.

On September 30, 2011, Plaintiff requested an extension of time to respond to the motion to dismiss due to health issues and the loss of his "legal mail," and requested copies of his Complaint and Defendant's Motion. Pl.'s Mot. 2. The Court granted Plaintiff's request and ordered that Plaintiff respond to Defendant's Motion on or before November 13, 2011. Plaintiff once again failed to respond to Defendant's Motion to dismiss by the Court-ordered date, and has not filed any documents with the Court since September 30, 2011.

On December 12, 2011, the Court ordered Plaintiff to show cause why this action should not be dismissed for failure to prosecute. The Court warned Plaintiff that "failure to respond in a timely manner to this order may lead to dismissal of Plaintiff's claim" and ordered Plaintiff to respond by January 12, 2012. Order, Dec. 12, 2011.

Eight weeks have passed since the due date for Plaintiff's filing, and Plaintiff has not responded to either Defendant's Motion to Dismiss or the Show Cause Order.

### **Discussion**

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted." Link v. Wabash R.R. Co., 370 U.S. 626, 629 (1962). RCFC 41(b) explicitly states that "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, the court may dismiss on its own motion . . . ." Thus, RCFC 41(b) expressly permits a sua sponte dismissal for failure to prosecute.

Dismissal, "the most severe in the spectrum of sanctions . . . must be available to the district court in appropriate cases . . . ." Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); see also Kadin Corp. v. United States, 782 F.2d 175, 177 (Fed. Cir. 1986) (While "dismissal is a harsh sanction," the Court of Federal Claims' "power to dismiss . . . must be more than theoretical."). The Federal Circuit has repeatedly upheld orders dismissing plaintiffs' cases for failure to prosecute. See, e.g., Adkins v. United States, 816 F.2d 1580, 1581-82 (Fed. Cir. 1987) (upholding trial court's dismissal for failure to prosecute when plaintiffs repeatedly did not timely comply with court orders); Kadin, 782 F.2d at 175. Dismissal can be a tool to aid this Court in securing "the just, speedy, and inexpensive determination of every action and proceeding." RCFC 1; see also Reading Anthracite Co. v. United States, 9 Cl. Ct. 63, 65 (1985) ("In exercising such discretion, the overriding consideration is the court's duty

to protect and further the integrity of an orderly and speedy pursuit of justice.”) (citing Link, 370 U.S. at 626). Thus, “dismissal is intended to be both a punishment for the offender and a deterrence to others.” Adkins, 816 F.2d at 1582 (citing Nat’l Hockey League, 427 U.S. at 643 (1976)).

While failure to prosecute can be grounds for dismissal, proper consideration of Plaintiff’s pro se status is important because the normal rules of procedure are somewhat relaxed for pro se litigants. See McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1356 (Fed. Cir. 2007) (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam)). The Federal Circuit has cautioned that it “does not expect a pro se litigant to be made to jump through a confusing array of procedural hoops.” Mendoza v. Merit Sys. Prot. Bd., 966 F.2d 650, 653 (Fed. Cir. 1992). Nevertheless, the Federal Circuit has emphasized that relaxing procedural standards is not the same as excusing compliance. Id. at 653. In Mendoza, the Federal Circuit refused to excuse the pro se plaintiff’s noncompliance with filing deadlines where “there was nothing mysterious or incomprehensible” in a show cause order that required a response by a certain date, and upheld dismissal. Id. at 653-54.

A court will not impose the harsh penalty of dismissal absent appropriate circumstances. Nat’l Hockey League, 427 U.S. at 643. One important consideration in this analysis is a clear warning to dilatory plaintiffs of the consequences of continued failings to comply with court orders. E.g., id. at 641; Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180, 1183-84 (Fed. Cir. 1990); see also Duncan v. United States, 432 F. App’x. 963, 966 (Fed. Cir. 2011) (emphasizing, in upholding dismissal for failure to prosecute, that pro se plaintiff had been given notice that dismissal would follow if plaintiff did not comply with court orders).

In this case, just as in National Hockey League, Claude E. Atkins, and Duncan, the Court has repeatedly given Plaintiff the opportunity to respond to Defendant’s Motion to Dismiss and the Court’s orders, including on two occasions, extending permission to respond until well after the initial deadline had passed. On September 30, 2011, after Plaintiff had missed the first deadline to respond and the Court had issued an order directing him to respond, Plaintiff filed a request for an extension of time. The Court granted Plaintiff’s request and ordered Plaintiff to respond by November 13, 2011. When Plaintiff did not timely respond, this Court issued its Show Cause Order of December 12, 2011. Plaintiff still has not responded.

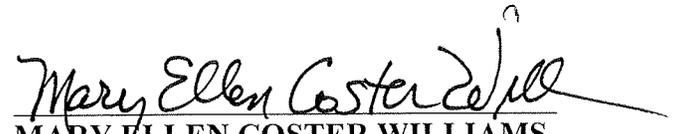
In addition to giving Plaintiff multiple chances to respond, the Court has been clear about the consequences of failing to respond. Each of the orders issued to Plaintiff explicitly stated that his noncompliance with their requirements could lead to dismissal for failure to prosecute. Despite repeated warnings, Plaintiff has still not responded to Defendant’s Motion to Dismiss or to this Court’s Show Cause Order, eight weeks after its last clear command for him to do so. As such, the Court finds that Plaintiff has failed to prosecute his claims.<sup>2</sup>

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<sup>2</sup> Even if Plaintiff had timely prosecuted this action, Plaintiff has not established that this Court possesses jurisdiction to hear his suit. Plaintiff asserts claims only against Florida officials. Compl. 1. Accordingly, the Court would dismiss the Complaint for lack of jurisdiction as the United States is not the defendant. United States v. Sherwood, 312 U.S. 584, 588 (1941). Further, Plaintiff has identified no separate money-mandating statute that would give this Court Tucker Act jurisdiction. In re United States, 463 F.3d 1328, 1333 (Fed. Cir. 2006). To the

**Conclusion**

For the reasons stated above, Plaintiff's Complaint is **DISMISSED with prejudice** for failure to prosecute pursuant to RCFC 41(b).

  
MARY ELLEN COSTER WILLIAMS  
Judge

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extent that Plaintiff alleges fraud and embezzlement, those allegations would also be dismissed because this Court lacks jurisdiction. LeBlanc v. United States, 50 F.3d 1025, 1031 (Fed. Cir. 1995); Joshua v. United States, 17 F.3d 378, 379 (Fed. Cir. 1994).