

In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 98-554C

(Filed August 14, 2009)

RONALD W. STEVENS,
as Personal Representative of the
Estate of **TERRY C. BRUNNER,**

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Gale R. Gustafson, Gustafson & Rohrer, Conrad, Montana, for the plaintiff.

Stephen M. Mager, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, with whom were *Gregory G. Katsas*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Donald E. Kinner*, Assistant Director, all of Washington, D.C., for the defendant. *Richard A. Medema*, Office of Chief Counsel, Drug Enforcement Administration, Arlington, Virginia, of counsel.

MEMORANDUM OPINION AND ORDER

WOLSKI, Judge.

This case, now litigated by plaintiff Ronald W. Stevens as personal representative of the estate of Terry Brunner, concerns a contract between the late Mr. Brunner and the United States Drug Enforcement Administration (“DEA”). On motions for summary judgment, the Court previously determined that a contract was formed in August 1992 under which Mr. Brunner was to receive a monthly salary of \$2,000, plus reimbursement of expenses, for his services as a confidential informant. *See Brunner v. United States*, 70 Fed. Cl. 623, 647-49 (2006). Presently before the Court are motions for summary judgment as to damages. Plaintiff contends that the government owes \$6,200.00 for unpaid salary, \$2,501.24 for non-reimbursed relocation expenses, and \$2,000 for either expenses, or a reward, connected to a specific case. Plaintiff also requests \$15,000 in awards for Mr. Brunner’s role in the indictment of six criminal defendants -- although the Court previously held that no evidence supported the involvement of a DEA official, possessing the requisite authority, in the creation or ratification of an agreement to pay

such awards. *Id.* at 644-47. The government cross-moved for summary judgment, arguing that plaintiff could not prove entitlement to any damages. For the reasons that follow, the plaintiff's motion is GRANTED-IN-PART and DENIED-IN-PART and the defendant's cross-motion is GRANTED-IN-PART and DENIED-IN-PART.

I. BACKGROUND

In a previous opinion, the Court found that at a meeting that took place on August 3, 1992, Mr. Brunner not only signed a DEA "Cooperating Individual Agreement" form, but also entered into an oral contract with the DEA. *See Brunner*, 70 Fed. Cl. at 625, 647-49. This conclusion was reached on the basis of not just Mr. Brunner's un rebutted testimony concerning this meeting, but also on government documents showing that the DEA had paid Mr. Brunner a \$2,000 monthly salary and expenses -- including vouchers which referenced the size of the salary and stated it was "owed," and a memorandum which acknowledged that Mr. Brunner was "paid per their agreement." *Id.* at 647-49. The Court held that Resident-Agent-in-Charge ("RAC") Ben Yarbrough possessed the implied authority to contract for payment of a salary and expenses, based on his authority to approve payments in advance for these purposes. *Id.* at 643-45. Mister Brunner was deactivated as a Cooperating Individual ("CI") on January 6, 1993. *See id.* at 625-26. Whether the DEA's obligation to pay Mr. Brunner's monthly salary was effective immediately, and whether it ran for the duration of his CI status, were not issues presented to the Court in the previous dispositive motions.

The Court also held that no contract was formed obliging the DEA to pay Mr. Brunner rewards for indictments, convictions or property seizures, as no agent who dealt with Mr. Brunner had authority, either express or implied, to bind the government in such contracts. *Id.* at 644. Nor was there evidence that an unauthorized contract for such rewards was ratified by an official with the authority to bind DEA to such commitments. *Id.* at 645-47.

In the pending motion for summary judgment, the plaintiff aims to establish that Mr. Brunner's contract with the DEA began in August and ran through December. He seeks salary payments of \$2,000 per month for August, November and December 1992, and \$200 for September 1992. Pl.'s Mot. for Summ. J. Br. in Supp. Thereof ("Pl.'s Mot.") at 7. He seeks reimbursement for moving expenses of \$2,501.24, based on Mr. Brunner's estimated moving costs of \$1,801.24, and \$700 in related costs totaling \$2,501.24. *Id.* at 4-5 (citing Jt. Stip. of Fact Re. Damages ("Jt. Stip."), Nos. 22-23). The plaintiff claims he is entitled to either expenses or a reward of \$2,000 for Mr. Brunner's grand jury testimony concerning Michael Snider. *Id.* at 5-6; Pl.'s Reply Br. in Supp. of Mot. for Summ. J. Opposing Def.'s Cross-Mot. ("Pl.'s Reply") at 12-17. The plaintiff also requests \$15,000 in rewards for the indictment of six criminal defendants. Pl.'s Reply at 18-19.¹

¹ It initially appeared that plaintiff also sought salary for October 1992, prejudgment interest, and attorney's fees. During oral argument the plaintiff's attorney clarified that, at this point, he is not seeking any of these.

In its cross-motion for summary judgment the defendant claims that the plaintiff is not entitled to salary for August 1992, because Mr. Brunner's contractual period did not begin until September 1992. Def.'s Cross-Mot. and Resp. to Pl.'s Mot. for Summ. J. On Damages ("Def.'s Mot.") at 2. The government maintains that the plaintiff is not entitled to salary for the months of November and December because the contractual period ended in October. *Id.* at 6-7. The defendant asserts that the plaintiff is not entitled to moving expenses because he lacks evidence establishing the amount of those expenses. *Id.* at 9-10. The government argues that the plaintiff is not entitled to any payment for Mr. Brunner's role in the Snider case, as it contends the relevant agreement concerned a broader investigation involving multiple defendants in which Mr. Brunner failed to provide the required testimony. *Id.* at 8; Def.'s Reply at 8-10. The defendant opposes plaintiff's request for indictment awards, as plaintiff failed to satisfy the criteria for reconsideration. Def.'s Mot. at 12.

II. DISCUSSION

A. Applicable Legal Standard

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c), Rules of the United States Court of Federal Claims ("RCFC"); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court interprets the facts and inferences therefrom "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). An outcome-determinative fact is a material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A dispute over facts is genuine "if the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.* To demonstrate a genuine dispute over a material fact, the nonmoving party need not "produce evidence in a form that would be admissible at trial." *Celotex Corp.*, 477 U.S. at 324. The moving party, however, must file with the Court the documentary evidence, such as exhibits, that support its assertions that material facts are beyond genuine dispute, *see* RCFC 56(c)(2)(B), unless it is basing its motion for summary judgment on the "absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325; *see also Anchor Sav. Bank v. United States*, 59 Fed. Cl. 126, 140 (2003).

B. August Salary

The parties are in agreement that no salary was paid to Mr. Brunner in August 1992. Plaintiff cites the absence of vouchers reflecting payment of salary as proof that \$2,000 is owed for this month. Pl.'s Mot. at 4. The government cites the same absence as proof that no salary was owed. Def.'s Mot. at 2 (citing Def.'s App. at 1-4). In support of his contention that the obligation to pay Mr. Brunner's salary began in August 1992, plaintiff cites the fact that the contract was formed on August 3, 1992, and notes that when Mr. Brunner was asked in a

deposition whether his work under the contract “commenced right after” he signed the CI agreement, he responded: “Pretty much so.” Pl.’s Reply at 3 (citing Pl.’s App. 1 to Pl.’s Reply at 14).² Vouchers for the month of August 1992 show that Mr. Brunner was paid \$75 for expenses related to an attempted drug purchase on August 4, Def.’s App. at 1; \$500 for information and expenses connected to an arrest and property seizure on August 10, *id.* at 2; another \$500 for information and expenses on August 21, *id.* at 3; and \$575 for the expenses of a security deposit for and rent of a residence and trailer, on August 27. *Id.* at 4.

Defendant bases its contention that Mr. Brunner’s contractual services began in September 1992, on some ambiguous deposition testimony of Mr. Brunner, the initial demand for payment sent by Mr. Brunner’s lawyer, and the timing of events referenced in some of plaintiff’s proposed findings. Def.’s Mot. at 2; Def.’s Reply at 2-4. Mister Brunner had stated that at his first meeting with DEA agents, it was discussed that he would be paid “by each job” until “the OCDETF project” was “off the ground.” Def.’s App. at 38. He later says of the August 21 voucher, “that may have been what they were giving me before we got the OCDETF thing straightened out because that started on 9/1/92,” *id.* at 42, although it is not clear if the September 1 reference is to the project or the period for which a voucher payment started. While a December 8, 1992 letter from plaintiff’s counsel did not include a request for August salary, *see* Def.’s App. at 26-28, plaintiff explains that this letter was sent before Mr. Brunner or his counsel had the opportunity to review his DEA records, including the August vouchers. *See* Pl.’s Reply at 3. Plaintiff proposed findings to the effect that Mr. Brunner was serving as an informant on a trial basis until he assisted in a drug purchase from one Michael O’Keefe, and thereafter began discussions with DEA about becoming an informant. *See* Def.’s Supp. App. to Def.’s Reply (“Def.’s Supp. App.”) at 13-14. The government argues that the DEA reports and payment vouchers place the O’Keefe arrest and the payment for Mr. Brunner’s assistance in mid-to late-August, and that the contract must necessarily start after that time. *See* Def.’s Reply at 4 (citing Def.’s Supp. App. at 1-2; Def.’s App. at 2-3).

Based on the evidence submitted by the parties, the Court concludes that genuine issues exist as to material facts needed to determine whether Mr. Brunner was owed a salary for August. As was noted, Mr. Brunner’s deposition testimony was ambiguous, and far from a concession that his salary did not begin until September. The passages cited could reasonably be read as indicating that since the vouchers referring to salary began on September 1, it was *possible* that earlier vouchers pre-dated the OCDETF. *See* Brunner dep. at 61-62. Concerning the proposed findings, the sequence suggested in them is either wrong on its face, since Mr. Brunner’s formal status as a CI had been established by the time of the O’Keefe arrest, *see* Def.’s App. at 19; Def.’s Supp. App. at 1-2, or the successful purchase referenced must have occurred prior to the events recounted in the DEA report on the arrest -- which does not mention any consummated purchase by Mr. Brunner. *See* Def.’s Supp. App. at 1-2. The Court does not find the letter from Mr. Brunner’s counsel, under the circumstances, to be of any evidentiary value on the point of the August salary. And the vouchers in the record indicate that Mr. Brunner was

² This document is docket number 188-4.

providing services to the DEA during the month of August. *See* Def.’s App. at 1-4. On the other hand, the best reading of Mr. Brunner’s testimony would seem to be that the salary obligation did not begin until the OCDETF project was launched, *see* Def.’s App. at 38, and a September 1 start is consistent with the August 27 date of the voucher for the expenses of renting the residence and trailer. *See id.* at 4. This portion of plaintiff’s claim cannot be resolved under the present motions.

C. September Salary

The documentary evidence conclusively establishes that the government failed to pay Mr. Brunner \$200 of his September salary. Only three vouchers from September indicate that they were salary payments: the September 1 voucher for \$1,000, described as being for salary for one-half of September, Def.’s App. at 5; the September 14 voucher for \$200, described as being for “partial monthly salary,” *id.* at 7; and the September 18 voucher for \$600, described as being the “[p]ayment of balance of monthly (\$2,000) salary owed for September 1992.” *Id.* at 10. The government argues that since the last of these states it was payment of the *balance* owed, the other \$200 must have been paid prior to that time, and identifies the September 8 voucher for \$200 as reflecting the other salary payment. Def.’s Mot. at 3. But the September 8 voucher was described as payment “for information and expenses on the Butte, MT trip,” Def.’s App. at 6; *see* Jt. Stip. ¶ 10, and makes no mention of salary. The salary vouchers do not mention any specific events or purposes, *see* Def.’s App. at 5, 7, 10, 13, while the reimbursements for expenses often do. *See id.* at 1, 8, 11. There is no basis for categorizing the September 8 voucher as a salary payment, and thus it is beyond dispute that plaintiff is owed \$200 for the shortfall in Mr. Brunner’s September salary payments.

D. November and December Salary

Plaintiff maintains that under Mr. Brunner’s contract, the payment of the monthly salary was coterminous with the period of his activation as a confidential informant. *See* Pl.’s Mot. at 4. Since the DEA did not deactivate Mr. Brunner until January 1993, plaintiff requests salary for the months of November and December. *Id.* Plaintiff cites no evidence to support his contention that the payment of Mr. Brunner’s salary was based on his CI status, rather than for services provided to the DEA.

The government denies that plaintiff is entitled to salary for November or December 1992. Def.’s Mot. at 5. It contends that Mr. Brunner did no work for the Great Falls, Montana office of the DEA after having been found to possess marijuana and a firearm in late October 1992. *Id.* at 5-7. The government also points out that no evidence has been identified showing that Mr. Brunner performed any services for the DEA in December 1992, and notes that the second letter sent by Mr. Brunner’s counsel to the DEA made no claim for a December salary and suggested a proration of the November salary. Def.’s Mot. at 7-8 & n.5 (citing Def.’s App. at 32).

The Court finds that genuine issues of material fact exist regarding whether salary was

owed Mr. Brunner for November. The record shows two payments made by the DEA to Mr. Brunner in November 1992. The first was a payment of \$300 made by the South Lake Tahoe office on November 10, connected with the investigation of drug trafficking in northern Nevada and eastern California. Def.'s App. at 17; Def.'s Supp. App. at 8. The second was a \$500 payment made by the Great Falls, Montana office on November 23. Def.'s App. at 18. The voucher described this as "for expenses incurred re RM-92-Z003," and stated that Mr. Brunner "will be paid in full \$2,000 at the end/close of this case." *Id.* The Court had previously found this to be a reference to the November salary, rather than to a promised reward. *See Brunner*, 70 Fed. Cl. at 646. The government now contends that this represents a separate contract to pay Mr. Brunner \$2,000 for testifying in cases which were the fruits of his work. *See Def.'s Mot.* at 6, 8. In any event, the vouchers could reasonably be viewed as supporting the position that Mr. Brunner continued to perform work under his contract in November, and the letter from his counsel appears to have offered a compromise, not a concession. *See Def.'s App.* at 32. On the other hand, the first voucher could reasonably be viewed as unrelated to the contract, and the second as reflecting a new contract. Thus, the issue of November salary cannot be determined under the present motions.

Concerning the claim for December salary, no evidence has been identified from which it can be inferred that Mr. Brunner performed any services for the DEA in December. Moreover, the first letter sent by his counsel to the DEA, dated December 8, 1992, stated that Mr. Brunner "believes that he was in your employ continuously through most of November," *id.* at 26, and "believes he was still on duty, and willing and ready to work continuously through the end of November." *Id.* at 27. No similar belief was expressed for December, and the letter did not request December salary. Since no evidence suggests that the agreement to pay Mr. Brunner a monthly salary was to run until deactivation as a CI, and no evidence shows any services performed in December, there is no basis upon which an award of December salary may be made.

E. Relocation Expenses

The plaintiff argues that he is entitled to \$2,501.24 as reimbursement for Mr. Brunner's relocation expenses. Pl.'s Mot. at 4-5. This figure is based in part on an \$1,801.24 estimate of moving expenses which Mr. Brunner received from a commercial mover prior to December 8, 1992. *Id.*; *see also* Jt. Stip. ¶ 22.³ The remainder is an estimated \$700 in moving expenses, "including meals and lodging, for [Mr. Brunner] and his wife in driving their two vehicles to their destination," also made prior to December 8, 1992. *Id.* ¶ 23; *see also* Def.'s App. at 27 (describing the costs as including fuel for a three-day trip of over 1,100 miles, and costs incurred for two minor children). Plaintiff contends this is an underestimate, as Mr. Brunner ultimately

³ The parties stipulated that this estimate was from Atlas Van Lines, and was for a move from Conrad, Montana to Ashland, Wisconsin. Jt. Stip. ¶ 22. The letter from Mr. Brunner's counsel which submitted the estimate at the time stated it was from A-1 Moving, and was for a move from Great Falls, Montana to Ashland. *See Def.'s App.* at 27.

had to move to Fort Erie, Ontario, which was allegedly almost as twice as far from Conrad Montana as was the destination for which the estimates were made. Pl.'s Mot. at 5.

The government points out that Mr. Brunner testified that he first moved to central Wisconsin to take a job similar to the one that he had lined up in Ashland, and moved to Fort Erie six months later. *See* Def.'s Mot. at 9 (citing Def.'s App. at 46-47). At any rate, plaintiff has failed to provide any evidence of the actual costs of Mr. Brunner's move to whichever part of Wisconsin he next settled. Estimates of a hypothetical move made before-the-fact are not proof of the actual costs of his family's move. Plaintiff has identified no evidence demonstrating that Mr. Brunner used a commercial mover to relocate, or even that he and his wife moved two vehicles to Wisconsin. On this point, an affidavit or testimony from Mr. Brunner explaining the logistics of his move and stating his belief that the prior estimate was close to the actual costs would have been enough to at least survive the cross-motion. But it is not even clear where he moved to, *see* Def.'s App. at 46-47, and there is no evidence from which the method and costs of this move may reasonably be inferred. Therefore, the Court grants the defendant's cross-motion for summary judgment regarding relocation expenses.

F. The Promise to Pay \$2,000 Memorialized on the November 23 Voucher

The voucher which reflected the November 23, 1992 payment of \$500 to Mr. Brunner "for expenses incurred re RM-92-Z003" also contained the remark that Mr. Brunner "will be paid in full \$2,000 at the end/close of this case." Def.'s App. at 18. Defendant characterizes this as "a deal" under which "Mr. Brunner was to receive \$2,000 in order to close out his cases by testifying for DEA." Def.'s Mot. at 8 (citing Def.'s App. at 18, 29, 30, 32, 34). As the Court noted above, one could reasonably construe the remark on this voucher as reflecting a new contract to pay Mr. Brunner \$2,000, but could also reasonably view it as a reference to the November salary due under the August 3 oral contract. Thus, material facts are at issue concerning whether the voucher represents a new "deal."

Moreover, even if it were a separate contract, the material facts needed to establish whether Mr. Brunner performed his side of the bargain are genuinely at issue. While the documentary evidence seems to indicate that file "RM-92-Z003" was entitled "Cossack Motorcycle Gang," *see* Def.'s Supp. App. at 3, supporting the defendant's claim that participation in multiple legal proceedings was anticipated, the voucher itself references "this case" in the singular. *See* Def.'s App. at 18. RAC Yarbrough's handwritten note to file seems to state that the \$2,000 would be paid to Mr. Brunner "at the conclusion of his testimony against *one* of the targets." *Id.* at 29 (emphasis added). A memorandum from the Special Agent in Charge stated Mr. Brunner "would be paid after his/her testimony in Court," which suggests just one appearance. *Id.* at 30. And evidence in the record supports the fact that Mr. Brunner testified before a grand jury against Michael Snider. *See id.* at 43-44.

Plaintiff agrees that the \$2,000 referenced in November 23 voucher is a separate promise to pay \$2,000, in addition to that month's salary, but contends it related solely to the Snider testimony. Pl.'s Mot. at 5-6; Pl.'s Reply at 12-17. For the same reasons just described, material

facts that are genuinely at issue prevent the Court from determining this portion of the case under the present motions.

G. Rewards for Indictments and Convictions

In the first set of motions for summary judgment, Mr. Brunner was given the opportunity to establish that any of the DEA agents with whom he dealt possessed the contractual authority to promise rewards for indictments or convictions, and he failed to establish this. *See Brunner*, 70 Fed. Cl. at 644. Plaintiff now seeks six such rewards of \$2,500 each. *See* Pl.'s Mot. at 6-7; Pl.'s Reply at 17-18. Plaintiff has not moved for reconsideration of the prior ruling, but even if his papers are construed as such a motion, the request is denied for failure to identify any proper ground for reconsideration. *See* RCFC 59(a)(1).

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS-IN-PART** plaintiff's motion for summary judgment, concluding that plaintiff is entitled to damages of \$200 for the balance of the September 1992 salary owed to Mr. Brunner. The Court **GRANTS-IN-PART** defendant's cross-motion for summary judgment, as plaintiff is not entitled to a payment of Mr. Brunner's salary for December 1992 and has no proof of Mr. Brunner's relocation costs. The two motions are **DENIED** in all other respects.

Counsel for the parties are to confer to discuss, among other things, the prospects for settlement, and shall file a Joint Status Report suggesting further proceedings on or by **September 14, 2009**.

IT IS SO ORDERED.

s/ Victor J. Wolski

VICTOR J. WOLSKI

Judge