In the United States Court of Federal Claims

Case No. 04-610C
(Filed: Nov. 15, 2005)

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AMERISOURCE CORPORATION, *
Plaintiff, *
*
v. *
*
THE UNITED STATES OF AMERICA, *
Defendant. *
*

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ORDER

This case involves an alleged taking of pharmaceutical products owned by the Plaintiff, AmeriSource Corporation. According to Amerisource, the United States seized and retained the drugs as evidence in third party criminal prosecutions. The Government has denied Plaintiff's requests for return of the drugs, and has maintained custody of this property to the present. Having since expired, the drugs are now worthless. Plaintiff seeks $150,856.26, the purported full value of the pharmaceuticals at the time the taking occurred.

Defendant moved to dismiss the Complaint for lack of subject matter jurisdiction and for the failure to state a claim upon which relief may be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims (RCFC), respectively. Defendant contends that the United States retained these prescription drugs pursuant to its police power and, therefore, any loss in the property's value is not compensable under the Fifth Amendment.

The gist of the Government's motion relates not to subject matter jurisdiction but rather to the fact that AmeriSource alleges a claim for which there is no remedy. Our review of a Rule 12(b)(6) motion requires that we assume the accuracy of the facts as pled by the Plaintiff. Moreover, Rule 12(b)(6) requires us to consider whether the Plaintiff can prove any set of facts supporting the requested relief. On these allegations alone, without more information, we cannot conclude at this juncture that the Government's actions necessarily fall within the contours of a reasonable exercise of the police power, and thus do not constitute a taking. **Accordingly, we deny the Government's motion without prejudice.**

I. Background:

The following facts are alleged in the Complaint, except where noted.

In early August, 2000, AmeriSource, a wholesale distributor of pharmaceutical products, entered into a contract to sell Viagra, Xenical, and Propecia to Norfolk Pharmacy (Norfolk) for $150,856.26. Plaintiff delivered fully conforming shipments of the drugs to Norfolk at its principal place of business in Weirton, West Virginia. Norfolk subsequently failed to pay AmeriSource for reasons that will become evident. According to the allegations in the Complaint AmeriSource retained a full security interest in the drugs until paid.

On July 27, 2000, immediately prior to entering into the contract with AmeriSource, the two principals of Norfolk, Anita Yates and Anton Pusztai, were indicted by a federal grand jury in Alabama on various charges, including conspiracy, unlawful distribution of prescription pharmaceuticals, dispensing misbranded pharmaceuticals, operating an unregistered drug facility, and conspiracy to commit money laundering. On August 7, 2000, the United States executed a valid search warrant of Norfolk's facility in Weirton, West Virginia. As part of its investigation of Norfolk, the Office of the United States Attorney for the Middle District of Alabama seized a large quantity of pharmaceuticals, including the pharmaceuticals that had just been shipped by AmeriSource.

In October 2000, AmeriSource filed a motion in the United States District Court for the Middle District of Alabama seeking an order requiring the Government to return the pharmaceuticals that the company had delivered to Norfolk. The United States opposed AmeriSource's motion, claiming these pharmaceuticals were required as evidence in the criminal trials of Ms. Yates and Mr. Pusztai. Plaintiff was able to secure the principals' consent to release of the property to AmeriSource. Nonetheless, the Government persisted in its refusal to release the pharmaceuticals. The Complaint is silent concerning the District Court's ruling on Plaintiff's motion. However, the District Court apparently permitted AmeriSource to inspect the seized drugs in order to identify which it had shipped to Norfolk.

Ms. Yates and Mr. Pusztai were convicted and sentenced in June of 2002. Both appealed their convictions to the United States Court of Appeals for the Eleventh Circuit. The appeals were successful. The Court found that Ms. Yates and Mr. Pusztai had been denied their Sixth Amendment rights when the district court permitted a prosecution witness to testify by video teleconference. The convictions were reversed and the cases remanded for a new trial. Subsequently, however, prosecutors filed a petition for rehearing. On March 30, 2005, the Court granted the petition and vacated the panel decision. The appeal was reargued on October 6, 2005, before the Eleventh Circuit *en banc*. As of this writing, the appeal remains pending.

In sum, the possibility still exists for a new trial. "As we stand here today," counsel reminds us "the criminal case is far from over." Tr. at 18. The Government continues to retain the property at issue. It claims it has a legitimate right to retain the property as evidence. If there is another justification the reason has not been formally advanced. At some point in this timetable – it is not clear when – AmeriSource claims that the pharmaceutical products retained by the Government had expired. At oral argument, counsel for the Defendant confirmed that the drugs were expired, and as such, would not be returned in any case. Tr. at 14.

The Complaint details other efforts by AmeriSource to protect its interest in these products. On August 20, 2002, the United States District Court for the Northern District of West Virginia awarded AmeriSource damages in the amount of $208,070.12 against Norfolk. AmeriSource has been unable to collect on this judgment, however, since Norfolk had ceased operations and had no assets. AmeriSource filed its Complaint in this Court on April 8, 2004. After exploring ADR for several months, the parties instead opted to pursue litigation of the present motion.

II. Discussion:

The Takings Clause of the Fifth Amendment to the United States Constitution provides that the Government may not take private property for public use without providing just compensation. U.S. CONST. amend. V. This limitation prevents the government from imposing burdens on the property of individuals, when in fairness, the public should bear the burden. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It is designed not to prohibit the taking of private property, but rather to secure compensation for property owners when governmental interference amounts to a taking.

It is well settled, however, that when the Government acts pursuant to its police power, and independent of Fifth Amendment rights, no compensable taking occurs. *See Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir. 1990)*; Scope Enterprises v. United States*, 18 Cl. Ct. 875 (1989). Here, the Government argues that whenever it seizes and retains property to use as evidence in a criminal prosecution, no other showing is necessary for this to constitute a noncompensable exercise of police power. Accordingly, the Government contends its retention of the Plaintiff's pharmaceuticals did not violate the Plaintiff's Fifth Amendment rights.

The police power is implicated where the Government's seizure is motivated by public safety reasons. Likewise it is implicated when property is retained as evidence in criminal proceedings. However, whether seizing property as contraband or merely asserting temporary custody over it for evidentiary purposes, the Government's exercise of police power is not unlimited, as the Defendant's papers contend. For governmental action to be considered a legitimate exercise of police power, and thereby exempt from the Constitutional requirement to provide just compensation, it must adhere to a standard of reasonableness. *See Goldblatt v. Town of Hempstead,*

369 U.S. 590, 594-95 (1962) (exercise of police power must be necessary to protect the public interest and not unduly oppressive to the property owner) (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

As a general rule, property owners are entitled to have seized property returned once it is no longer needed for criminal proceedings in district court. *United States v. Wilson*, 540 F.2d 1100, 1103-04 (D.C. Cir. 1976). Although it is perfectly legitimate for the Government to maintain custody over the property awaiting criminal proceedings, it may not effect a *de facto* forfeiture of the property by holding it for an unreasonable period of time. *United States v. Premises Known As 608 Taylor Ave.*, 584 F.2d 1297, 1302 (3d Cir. 1978). This Court's predecessor recognized as much when it stated:

> [O]n appropriate facts, a taking could occur at various times during a criminal investigation. It might occur, as the facts alleged by plaintiff suggest, only when the Government fails to return property at close of the criminal proceeding. It might occur, as we held in *Yokum v. United States*, at the time *contraband* is seized as the former owner's dominion over the property will be permanently ended. Or it might occur at some intermediate point when Government action is no longer consistent with mere custody of the property.

Kessler v. United States, 3. Cl. Ct. 123, 125 (1983) (internal citations omitted).

In its current procedural posture, this case presents the question whether Plaintiff could prove any set of facts upon which the Government's custody of this property would not be consistent with a valid exercise of police power. There are significant gaps of information in this matter. The true extent of the Government's refusal to return this property is unknown. At this stage, we have little more than assertions of Government counsel – unsupported by testimony or proffers of evidence from anyone involved with the criminal proceeding – to shed light on the allegations in the Complaint.

The Complaint indicates only that the property was initially seized and retained for evidentiary purposes in the trial – and after appeals, for use in a potential re-trial – of Ms. Yates and Mr. Pusztai. Compl. at ¶¶ 20, 24; *but see,* Compl. at ¶¶ 39 ("The U.S. government continued to refuse to return to AmeriSource its property, even though it no longer needed the pharmaceuticals as evidence.") We do not know if the pharmaceuticals were actually offered as evidence at trial. We also do not know whether the Government considered alternatives short of retaining all of the drugs. Nor are we absolutely certain of the continued need for the evidence. The answers to these questions may ultimately show that a takings has not occurred. However, a well-pled complaint survives these uncertainties.

The Government has suggested that the federal prosecutors may have withheld the drugs not merely because of their evidentiary value, but also because those products had been misbranded or repackaged after Plaintiff had surrendered possession of them. Tr. at 19-20. Had the drugs been seized or retained because the very nature of this property posed a threat to public health or safety, then certainly the police power would be implicated. Dismissal might, therefore, be appropriate because

our precedent makes it clear that such an action is not a Fifth Amendment taking. *See*, *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir. 1990); *B&F Trawlers, Inc. v. United States*, 27 Fed. Cl. 299, 304-05 (1992) (deliberate sinking of vessel that posed a danger to navigation).

The Government also suggests that further factual development would reveal that Plaintiffs did not have clean hands. Tr. at 16, 21. The first time we heard this theory was at argument and it is pure speculation at this juncture. If established, our case would be similar to *Interstate Cigar*, relied upon extensively by the Government. In that case, Judge Hodges recognized that the Government exercised its police power to prevent the potential sale of pharmaceuticals in a manner that "would have been a serious threat to public health." *See Interstate Cigar* Co. *v. United States*, 32 Fed. Cl. 66, 70-71 (1994) (prescription drugs intended for export presented a danger to the public and could not legally be sold on the domestic market, since they were improperly marked and could not be accurately identified in the event of a recall.)

Judge Hodges arrived at his conclusions only after conducting a trial. This public safety purpose cannot be inferred from the pleadings. The Complaint does indicate that "dispensing misbranded drugs" was among the charges Ms. Yates and Mr. Pusztai faced. Compl. at ¶ 9. The Government seized a large quantity of prescription drugs, not just those belonging to AmeriSource. Compl. at ¶ 20. We have no way of knowing whether the "misbranding" charge applied to AmeriSource's pharmaceuticals. Nor is there any indication that Amerisource's property was intended for destruction or subject to forfeiture.

Although not raised by either party in the briefing, we note that several decisions of this Court address the interplay between just compensation under the takings doctrine and relief sought under Rule 41(g) of the Federal Rules of Criminal Procedure. This rule provides a method by which "a person aggrieved by ... the deprivation of property" may seek its return by the district court. Fed.R.Crim.P. 41(g). The availability of this relief in district court might, under certain circumstances, divest this Court of its jurisdiction for a takings claim. *See Carter v. United States*, 62 Fed. Cl. 365 (2004); *Duszak v. United States*, 58 Fed. Cl. 518 (2003). Indeed an adverse resolution of a motion for return of property may bar consideration of the matter under *res judicata*. *See Carranza v. United States*, 67 Fed. Cl. 106 (2005) (takings claim barred by resolution of Rule 41(g) motion where district court approved of Government's use of seized currency as offset against criminal fine.) In other cases, however, this Court has entertained takings claims without inquiring whether Rule 41(g) relief had been sought. *See e.g., Interstate Cigar Co. v. United States*, 32 Fed. Cl. 66 (1994).

It is unclear whether AmeriSource's district court request took the form of Rule 41(g) motion, and if it did, on what basis the District Court apparently denied relief. Again we have only counsel's representation, based on a document that is not part of the record, that a Federal magistrate denied the request because AmeriSource failed to prove ownership, and could collect against Norfolk or its principals. Tr. at 23-24. Either one of these circumstances might defeat a takings claim in this Court. Yet the Government has not raised these defenses formally much less substantiated them.

III. Conclusion:

At this early stage, the Defendant has relied solely on its assertion of an unlimited and nonreviewable right to exercise its police power. At the very least, Plaintiff has pled a taking requiring just compensation, sufficient to survive Defendant's motion to dismiss.

We therefore deny without prejudice the Government's Motion to Dismiss. The parties shall file a Joint Status Report no later than December 10, 2005, suggesting further proceedings, to include the filing of an Answer, if appropriate.

IT IS SO ORDERED.

/s/ Lawrence M. Baskir
LAWRENCE M. BASKIR
Judge