In the United States Court of Federal Claims

No. 05-106C
Filed June 27, 2005

APTUS COMPANY,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

Emanuel Lin, a sole proprietor doing business as Aptus Company, *pro se*, for plaintiff.

Andrew P. Averbach, Trial Attorney, Todd M. Hughes, Assistant Director, David M. Cohen, Director, Peter D. Keisler, Assistant Attorney General, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Oral argument was deemed unnecessary. For the reasons set forth below, defendant's motion is GRANTED as to Counts I-IV of plaintiff's complaint, and Count V is dismissed pursuant to Rule 12(h)(3) of the Rules of the Court of Federal Claims ("RCFC").

BACKGROUND[1]

On November 5, 1998, plaintiff was awarded a contract by the United States Army Corps of Engineers ("USACE") to upgrade equipment at a hydroelectric power plant in Sault Ste. Marie,

[1]The recitation of facts in this section does not constitute findings by the Court. All of the stated facts are either undisputed or alleged and assumed to be true for the purposes of the pending motion.

Michigan.[2] Compl. ¶ 1. The contract was terminated for default by defendant on June 26, 2000. *Id.* ¶ 3. Following plaintiff's termination for default and pursuant to a performance bond furnished by plaintiff prior to the award of the contract, defendant demanded performance of the remaining work required under the contract from plaintiff's surety, Chatham Reinsurance Corp. ("Chatham"). *Id.* ¶ 4. On September 8, 2000, defendant and Chatham executed a Tender Agreement for L & S Electric, Inc. ("L & S") to complete the work required by the contract. *Id.* ¶ 5. Under the terms of the Tender Agreement, Chatham agreed to pay defendant $188,887. *Id.* ¶ 6. This sum represented the difference between the amount defendant was to pay to L & S and the amount to be paid under the original contract with plaintiff. *Id.* ¶ 9. Chatham subsequently sued plaintiff in Texas state court to recover the $188,887, and obtained a judgment in the amount of $205,559.50. Compl. ¶¶ 11-12. Plaintiff later secured a release from Chatham upon payment of $175,000. *Id.* ¶ 13.

In a prior and directly related case decided by Judge Gibson on August 30, 2004, plaintiff asserted five separate counts against the defendant related to the June 26, 2000 termination for default. *Aptus Company v. United States*, 61 Fed. Cl. 638 (2004) ("*Aptus I*"). In its amended complaint, filed on August 6, 2001,[3] plaintiff alleged that the defendant was liable for 1) wrongful termination of contract ("Count 1"), 2) breach of contract ("Count 2"), 3) changes made to the contract ("Count 3"), 4) violations of federal suretyship law ("Count 4"), and 5) compensation for unjust enrichment ("Count 5"). *Id.* at 640.

On June 23, 2003, more than two years after plaintiff's original complaint was filed in *Aptus I*, plaintiff apparently became aware of additional information relating to the contract and the default termination. Pl's Opp. Def's Mot. Dismiss at 6-7. On October 16, 2003, plaintiff moved for leave to file a second amended complaint in which it attempted to assert the additional claims based upon the newly discovered information. *Id.* Plaintiff's motion for leave to file a second amended complaint was denied on October 30, 2003. *Id.* On March 2, 2004, the court denied a renewed motion by plaintiff to amend the complaint. *Id.*

After a two-week trial based on the counts asserted in plaintiff's August 6, 2001 amended complaint, Judge Gibson held that Count 2 and Count 5 were merely redundant statements of Count 1 and were thus merged with and subsumed by Count 1. *Aptus I*, 61 Fed. Cl. at 640. The court ruled in favor of the Government on Count 1. *Id.* at 664. Judge Gibson then turned to Count 4, plaintiff's claim against the Government for violations of federal suretyship law. As a basis for relief in Count 4, plaintiff relied on a published decision[4] of the United States Department of the Treasury, which revoked the Certificate of Authority previously issued to

---

[2] No. DACW35-99-C-0001

[3] Plaintiff's original complaint in *Aptus I* was filed on June 18, 2001.

[4] 65 Fed. Reg. 78 at 21,603 (March 31, 2000).

Chatham pursuant to 31 U.S.C. §§ 9304-9308 (2000).[5] *Id.* at 645. Plaintiff alleged that because the contracting officer had accepted Chatham as a surety in violation of this instruction, defendant had therefore violated federal suretyship law. *Id.* In examining whether the court had jurisdiction over this claim, Judge Gibson found that the suretyship provisions at issue did not contain a "money-mandating provision" as required by the Tucker Act, 28 U.S.C. § 1491 (2000). *Id.* Judge Gibson therefore dismissed Count 4 for lack of jurisdiction pursuant to RCFC 12(b)(1). *Id.* With respect to plaintiff's only remaining claim against the Government, Count 3, the court ruled in favor of the Government, finding no valid basis for plaintiff's claim against the defendant for changes made to the contract. *Id.* at 664.

On January 12, 2005, plaintiff filed a new complaint with the United States Court of Federal Claims. This complaint sets forth the claims that plaintiff attempted to advance in *Aptus I*, but was unable to pursue in that case because its motion for leave to amend its second amended complaint was denied. *See* Pl's Opp. Def's Mot. Dismiss at 6-7. In its complaint in this action, plaintiff alleges that 1) plaintiff should not be liable for the $7,500 increase in the cost in optional hiring of skilled craftsmen under the L & S contract; 2) various items for which damages had been claimed and paid have not been performed by L & S, therefore L & S should not have been paid in full; 3) the damages set forth in the Tender Agreement were invalidated as the completion contract proceeded forward because of various modifications to the contract; 4) defendant acquiesced in L & S's failure to remedy certain deficiencies which contributed to defendant's decision to terminate plaintiff's contract for default; 5) assignment of plaintiff's interests in the original contract, first to Chatham and then to L & S, violated 31 U.S.C. § 3727 (2000) and 41 U.S.C. § 15 (2000) because Chatham's Certificate of Authority as an acceptable federal surety had been revoked.

On March 14, 2005, defendant responded to plaintiff's complaint with a motion to dismiss for failure to state a claim upon which relief can be granted. In its motion to dismiss, defendant argued that plaintiff had not pleaded facts sufficient to set forth a basis for relief and that, to the extent that it had done so, plaintiff's claims were barred by the doctrine of *res judicata* or claim preclusion. On April 8, 2005, plaintiff filed its opposition to defendant's motion. On April 18, 2005, defendant filed a reply.

DISCUSSION

I. Jurisdiction of the Court

The subject matter jurisdiction of United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491, extends to "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated

[5] Sections 9304-9308 of Title 31 authorize the acceptance of corporate surety companies on bonds given to the United States.

damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Additionally, plaintiff's "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for damage sustained.'" *United States v. Testan*, 424 U.S. 392, 400 (1976) (citations omitted). Those claims for which plaintiff does not establish a "money-mandating" provision are subject to RCFC 12(h)(3), which provides that "whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

II. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claim Based on the Assignment of Claims Act

In *Aptus I*, plaintiff asserted that because the contracting officer had accepted Chatham as a surety, defendant violated 31 U.S.C. §§ 9304-9308, and was thus liable to plaintiff. *Aptus I*, 61 Fed. Cl. at 645. That claim was dismissed by the court pursuant to RCFC 12(b)(1) because 31 U.S.C. §§ 9304-9308 did not contain a "money-mandating provision," and thus the court did not have jurisdiction pursuant to the Tucker Act. *Id.*

Plaintiff now alleges in Count V of its complaint that "[a]ssignment of plaintiff's interests in the original contract by the defendant first to Chatham Reinsurance Corporation then to L & S Electric violates the Assignment of Claims Act of 1940, 31 U.S.C. § 3727, 41 U.S.C. § 15." Compl. ¶ 31. Like the claim advanced by plaintiff in *Aptus I*, the suretyship claim asserted in this case is brought under statutes that do not constitute money-mandating provisions. Rather, both statutes have been interpreted by the courts to be for the protection of the Government. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945) ("The provisions of the statute governing assignment of claims against the Government [formerly 31 U.S.C. § 203, currently 31 U.S.C. § 3727] are for the protection of the Government."); *G.L. Christian & Assocs. v. United States*, 160 Ct. Cl. 1, 312 F.2d 418, 422-23 (1963) ("the Anti-Assignment Act . . .[,] 41 U.S.C. § 15[,] . . . has . . . been interpreted as being solely for the Government's own benefit."). Because the statutes relied upon by plaintiff provide only for the protection of the Government, plaintiff has not identified a money-mandating provision upon which to base the claim set forth in Count V of its complaint. Thus, this Court lacks subject matter jurisdiction. The Court therefore dismisses that claim pursuant to RCFC 12(h)(3).

III. Standard of Review for Motion To Dismiss

Dismissal under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted is appropriate when the facts as alleged in the complaint do not entitle the plaintiff to a legal remedy. *New York Life Ins. Co. v. United States*, 190 F.3d 1372, 1377 (Fed. Cir. 1999). In reviewing a motion to dismiss, the court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in favor of the plaintiff. *Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir. 1998). The case may be properly dismissed, however, if the plaintiff "can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002) (quoting

Conely, 355 U.S. at 45-46). The basis for defendant's motion to dismiss is that plaintiff's remaining claims are barred by the doctrine of claim preclusion. "A claim preclusion defense is appropriately considered as a motion to dismiss pursuant to RCFC 12(b)(4) [currently RCFC 12(b)(6)]." *Lyons v. United States*, 45 Fed. Cl. 399, 402-03 (1999).

A *pro se* plaintiff is held to a less stringent standard than one represented by counsel. *Bernard v. United States*, 59 Fed. Cl. 497, 500 (2004). Though a plaintiff's *pro se* status may excuse the ambiguities in a plaintiff's complaint, it does not excuse the failures, if such there be. *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995). The court may strain its proper role in adversarial proceedings in searching the complaint for facts that might possibly be construed to state a cause of action. *Ruderer v. United States*, 188 Ct. Cl. 456, 468, 412 F.2d 1285, 1292 (1969). The court should interpret a *pro se* plaintiff's complaint liberally, but, nonetheless, a plaintiff must present some set of facts upon which a claim for relief can be based. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

IV. Plaintiff's Remaining Claims Are Barred by the Doctrine of Claim Preclusion

The doctrine of "claim preclusion is a threshold issue that must be addressed before the court can consider the [plaintiff's arguments] . . . ." *Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1298 (Fed. Cir. 2001). Claim preclusion forecloses matters that, although never litigated or even raised, could have been advanced in an earlier suit. *Carson v. Department of Energy*, 398 F.3d 1369, 1375 (Fed. Cir. 2005) (citations omitted). Under this doctrine, "a second suit will be barred by claim preclusion if (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first." *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000) (citations omitted). "Moreover, the law is well settled that the pendency of an appeal has no affect [sic] on the finality or binding effect of a trial court's holding." *Ssih Equip. S.A. v. United States Int'l Trade Comm'n*, 718 F.2d 365, 370 (Fed. Cir. 1983) (citing *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903)).

Here, each element of the doctrine of claim preclusion is met. Identity of parties is established by the fact that both *Aptus I* and this action involve the exact same parties. The second element is established because an adjudication on the merits results from any dismissal unless the court orders otherwise or the case is dismissed for lack of jurisdiction or a failure to join a party. RCFC 41(b). *Aptus I*, which was decided after trial, therefore, constitutes an earlier adjudication on the merits. 61 Fed. Cl. at 664. The Federal Circuit has adopted a transactional analysis in determining whether the third element of claim preclusion has been established. *See Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 478-79 (Fed. Cir. 1991). Claim preclusion will extinguish "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose." *Id.* at 478 (citing RESTATEMENT (SECOND) OF JUDGMENTS, § 24(1)). Plaintiff's complaint is based on the same transactional facts as those of *Aptus I*. All claims in each action arise out of plaintiff's entry into a contract with defendant, plaintiff's termination for default, and subsequent

performance of the contract by plaintiff's surety. Therefore, each claim asserted by plaintiff in this action should have been brought in *Aptus I*.

Plaintiff argues that its "second set of claims aris[e] out of the newly discovered transactional facts . . . " that were discovered on June 23, 2003. Pl's Opp. Df's Mot. Dismiss at 7. The claims plaintiff sought to add to *Aptus I* are the same claims upon which plaintiff seeks relief in this case. *See id.* (stating that "the court denied APTUS' motions aimed at merging the instant cause of action to APTUS1 . . . ."). Plaintiff argues that claim preclusion cannot apply because its motion to amend the complaint in *Aptus I* was denied by the court, which prevented plaintiff from asserting its new claims, and therefore if its claims are precluded here, it will not have had a "full and fair opportunity to litigate" its claims. *Id.* However, "[i]t is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late." RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. b. Rather than wait until the conclusion of *Aptus I* and file another suit, plaintiff's "proper recourse was to appeal from the denial of his motion to amend." *Sendi v. NCR Comten, Inc.*, 624 F. Supp. 1205, 1207 (E.D. Pa. 1986) (citing *Poe v. John Deere Co.*, 695 F.2d 1103, 1107 (8th Cir. 1982), *Eliason Corp. v. Bureau of Safety and Regulation*, 564 F.Supp. 1298, 1303-04 (W.D.Mich. 1983)); *see also Huck v. Dawson*, 106 F.3d 45, 49 (3d Cir. 1997).

Plaintiff has filed an appeal to the United States Court of Appeals for the Federal Circuit from the judgment in *Aptus I*. *Lin v. United States*, No. 05-5030. However, in that appeal, plaintiff has not challenged the court's decision in *Aptus I* to deny plaintiff leave to amend its complaint. *See* Appellant's Corr. Br. at 1, *Lin*, No. 05-5030; Def's Reply at 3. Plaintiff's proper remedy for the denial of its motion for leave to file its second amended complaint in *Aptus I* was to appeal the denial of that motion, not to file this second action. Accordingly, each of plaintiff's remaining claims is barred by the doctrine of claim preclusion. Defendant's motion to dismiss pursuant to RCFC 12(b)(6) is therefore granted with respect to plaintiff's remaining claims, which are set forth in Counts I-IV of plaintiff's complaint.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss pursuant to RCFC 12(b)(6) is GRANTED as to Counts I-IV of plaintiff's complaint, and Count V is dismissed pursuant to RCFC 12(h)(3). The Clerk is directed to enter judgment dismissing plaintiff's complaint in accordance with this Opinion and Order.

IT IS SO ORDERED.

GEORGE W. MILLER
Judge