

In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 04-801C

(Filed May 31, 2005)

TODD J. VERDONE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

MEMORANDUM OPINION AND ORDER

On May 7, 2004, the plaintiff Todd J. Verdone filed the instant action against the United States seeking \$19 million in damages as “just compensation” for the “personal injuries” that the defendant allegedly caused him. The plaintiff, concurrent with his complaint’s filing, applied to proceed *in forma pauperis*. The defendant moved to dismiss the complaint under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”). The plaintiff subsequently moved for judgment on the pleadings and to “strike” the defendant’s motion to dismiss. The government responded to both motions.

In reviewing these motions, it came to the Court’s attention that the plaintiff originally filed *two separate complaints* in this Court on May 7, 2004, but only one of these complaints was served on the defendant. Because each complaint has an identical first page (including being numbered as page 5), the Clerk’s Office mistakenly treated the two complaints as two copies of a single complaint. Consequently, both complaints were given the same case number. A copy of the complaint concerning Warden Keith Olsen was sent to the defendant by the Clerk’s Office. The defendant did not receive a copy of the second complaint.

To rectify this situation, the Court, in its January 10, 2005 order, directed the Clerk’s Office to combine the two complaints into one (so as to maintain the single case number) and to serve the resulting complaint on the defendant. The defendant was given time to respond to the complaint. It moved to dismiss the second, recently served, complaint. The plaintiff was given

the usual twenty-eight days to respond. RCFC 7.2(c). No response was filed. The Court accordingly finds this case fit for decision without oral argument.

The complaint originally served upon the defendant, which concerns Warden Olsen, shall be referred to as the Olsen Complaint. The subsequently served complaint, which concerns a panel of Seventh Circuit judges including Judge Posner, shall be referred to as the Posner Complaint.

I. BACKGROUND¹

The plaintiff was convicted of tax fraud in the Western District of Wisconsin. *United States of America v. Verdone*, No.03-CR-38-S-01 (W.D. Wis. 2003). His claims in this action stem from the procedures leading up to his conviction, the conviction itself, and his subsequent imprisonment. The plaintiff has filed many complaints in this Court. These cases, captioned *Verdone v. United States*, and numbered 03-2359C, 03-2360C, 03-2361C, 03-2362C, 03-2688C & 03-2689C (consolidated), 03-2690C and 04-0001,² were all dismissed for want of jurisdiction by Judge Lettow of this Court. See App. to Def.'s Mot. Dismiss ("Def.'s App.") at 8, 24, 41, 59, 96, 106.

II. DISCUSSION

The plaintiff lays out in his complaint nineteen claims. In one set of claims, he seeks personal injury damages for fraud, false imprisonment, false arrest, malicious prosecution, defamation, identity theft, "oppression" and unjust enrichment by the government's "utilizing [the plaintiff] as a human resource." Posner Compl. ¶¶ 1, 4-9, 18-19; Olsen Compl. ¶¶ 1, 4-9, 18-19. As damages for these alleged wrongs, the plaintiff seeks compensation for loss of life and liberty, conjugal rights, companionship with his wife and children, wages, ability to provide for the welfare of his family and to raise his children, loss of offspring and financial hardship. Posner Compl. ¶¶ 2-3, 10-17; Olsen Compl. ¶¶ 2-3, 10-17.

A. The defendant's motions to dismiss

The defendant bases its dismissal motions on two grounds. First, the government argues that the issue of this Court's jurisdiction (or lack thereof) over the claims the plaintiff raises here

¹ On a motion to dismiss for want of subject matter jurisdiction, all disputed questions of fact must be resolved in the light most favorable to the non-moving party, here the plaintiff. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Pixton v. B&B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996).

² Although the opinion is not included in the Appendix to the defendant's dismissal motion, Case No. 04-0001 was dismissed by Judge Lettow in an unpublished decision on April 15, 2004.

is res judicata, based upon the above-mentioned cases dismissed by Judge Lettow. Second, the defendant contends that, on the merits of the jurisdiction issue, the plaintiff's claims must fail because he seeks review of a district court's judgment, damages in tort, and recovery based on non-money-mandating provisions of the Federal Constitution, none of which falls within the scope of the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000).

In response, the plaintiff states that he:

has brought a "**TORT CLAIM**" against the UNITED STATES corporation for the negligence, wrongful acts and omissions [sic] of their employees. This cause of action stems from the persecution of the Plaintiff in a district court of the UNITED STATES under guise of a purported criminal proceeding. . . . [¶¶] The Plaintiff has been falsely charged, falsely indicted, falsely persecuted and falsely incarcerated under guise of a criminal matter which has no application of law whatsoever. The end result are torts against the Plaintiffs [sic] right to life, liberty and pursuit of happiness. [¶] The Plaintiff filed [here] a **TORT CLAIM** under the provisions [of the Federal Tort Claims Act].

Pl.'s Mot. J. Pleadings at 8-9 (emphasis in original).

Once a defendant has moved to dismiss the complaint under RCFC 12(b)(1), the plaintiff must establish that the Court has subject matter jurisdiction over his action. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942). Our Court's jurisdiction is granted principally through the Tucker Act, which provides in relevant part:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon 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 damages *in cases not sounding in tort*.

28 U.S.C. § 1491(a)(1) (emphasis added).

Although res judicata is normally raised on a 12(b)(6) motion for failure to state a claim, in this instance res judicata is properly raised on a 12(b)(1) motion. *See Maracalin v. United States*, 52 Fed. Cl. 736, 740 (2002). The defendant contends that the *issue* of jurisdiction has already been decided adversely against the plaintiff; that the plaintiff's action here is indistinguishable from the claims that were dismissed; and that, in defense of those claims, the plaintiff was provided a full and fair opportunity to argue his case. Therefore, the government argues, res judicata should bar the plaintiff from presenting the same jurisdictional issue.

The distinction between dismissal for want of jurisdiction and dismissal for res judicata on the issue of jurisdiction is more than semantic. If this action were the plaintiff's first, and the

Court believed that it had jurisdiction, then the defendant's dismissal motion would be unsupportable. But now, because of the prior cases decided against the plaintiff, even assuming that jurisdiction would otherwise be present, the Court would have to decline such jurisdiction as against this plaintiff on account of the earlier dismissals. To assume jurisdiction under these circumstances would undermine our judicial system, allowing disappointed plaintiffs the endless opportunity to file the same case time after time in the hope of finding an idiosyncratic court. The Court notes that even if jurisdiction is decided against a plaintiff, he may appeal the judgment, 28 U.S.C. § 1295(a)(3), move for reconsideration, RCFC 59, or request relief from judgment, RCFC 60. To provide another mode of relief by refusing to apply res judicata principles to jurisdictional issues would thus be unnecessary as well as unwarranted. The Court proceeds then to consider the res judicata question.

The Federal Circuit has held that a successful res judicata defense contains three elements: (1) a prior, final, valid judgment on the merits; (2) legal identity of parties; and (3) identity of transactional (or jurisdictional) facts. *See Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000).

The above-mentioned cases before Judge Lettow were dismissed prior to the plaintiff's filing of this action. The judgments dismissing those cases were final because they granted the defendant's motion to dismiss. The judgments were valid in that every court has the jurisdiction to determine its own jurisdiction, *see Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *Roth v. McCallister Bros., Inc.*, 316 F.2d 143, 145 (2d Cir. 1963) ("a tribunal always possesses jurisdiction to determine its jurisdiction, and any fact upon which that decision is grounded may serve as the basis for an estoppel by judgment in any later action"); 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3536, at 537 (2d ed. 1984) ("The rule has been that a court's determination that it has subject matter jurisdiction is res judicata of the issue, if the jurisdictional question actually was litigated and expressly decided") (footnote omitted), and unless a decision finding no jurisdiction is successfully appealed or otherwise set aside pursuant to the rules of the court, the judgment remains valid. As to the final sub-element, the judgments were on the merits in the sense that the merits there, as here, concern the Court's jurisdiction.

The parties to the prior judgments are the same as here. The jurisdictional facts of the prior judgments are the same as here. In the case before Judge Lettow, the plaintiff asserted various claims for money damages sounding in tort, non-money-mandating clauses of the Constitution,³ and, surprisingly, RICO, 18 U.S.C. §§ 1962, 1964(a). *See* Def.'s App. at 79-87. All of the claims, however, arose out of the plaintiff's alleged illegal arrest, detainment, conviction, sentencing and imprisonment. *See id.* at 2, 13, 29, 46, 67, 82, 103, 113. In the plaintiff's action presently before the Court, all the claims arise from the same allegedly illegal arrest, detainment, conviction, sentencing and imprisonment. Posner Compl. at 6-7.

³ The plaintiff did repeatedly cite to the Fifth Amendment and alluded to "just compensation." *See* Def.'s App. at 5, 19, 46, 64, 72, 103.

Because the prior judgments were final, valid and on the merits; because the parties are the same then as now; and because the pertinent jurisdictional facts remain unchanged: *res judicata* bars the plaintiff from seeking jurisdiction over the claims set forth in his complaint. As a consequence, the plaintiff has failed to meet his burden to establish that jurisdiction is present. The government's dismissal motions must be granted.

But even if the Court had the opportunity to review the jurisdictional issue presented in the plaintiff's action, it would still dismiss the case. The majority of the complaint's counts are alleged torts; those that are not are based on non-money-mandating provisions of the Constitution or the U.S. Code. Although the plaintiff repeatedly refers to the "just compensation" that is owed him and cites to the Fifth Amendment, he does not state any facts that would support a takings claim. Confinement is not a compensable taking of one's person. *See Hurtado v. United States*, 410 U.S. 578, 589 (1973) ("The detention of a material witness, in short, is simply not a 'taking' under the Fifth Amendment"); *Jones v. Philadelphia Police Dep't*, 57 Fed. Appx. 939, 941 (3d Cir. 2003); *Commer v. United States*, 66 F. Supp. 943, 945 (D. Mont. 1946) ("to assert that one's body is private property that may be taken by the United States for any governmental purpose of any kind upon the payment of just compensation is to contend for something so far contrary to our theory or government, the relationship of the government and citizens as to be untenable"). The Court also notes that the Thirteenth Amendment, because it explicitly countenances involuntary servitude as a lawful punishment to a crime for which one is duly convicted, supports the rule that confinement is not sufficient for a compensable taking under the Fifth Amendment. *See Commers*, 66 F. Supp. at 945. Here, references in the complaint to the Fifth Amendment and just compensation do not create jurisdiction. This must be established by factual allegations, not legal conclusions.

This Court is lenient with *pro se* plaintiffs. *See, e.g., Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (per curiam) ("however inartfully pleaded are held to less stringent standards than formal pleadings drafted by lawyers") (quotations omitted). *See also Castro v. United States*, 124 S. Ct. 786, 791-92 (2003); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Forshey v. Principi*, 284 F.3d 1335, 1357 (Fed. Cir. 2002); *Kelley v. Sec'y*, 812 F.2d 1378, 1380 (Fed. Cir. 1987); *Blum v. United States*, 227 Ct. Cl. 555, 558 (1981); *Clinton v. United States*, 423 F.2d 1367, 1368 (Ct. Cl. 1970); *Huffine v. United States*, 25 Ct. Cl. 462, 463 (1992). But the Court cannot be so lenient as to excuse a plaintiff from the requirement that jurisdiction be established.

The plaintiff himself states clearly in the previously quoted language from his motion for judgment on the pleadings that his action here is founded in tort. To the extent that his second complaint states new facts, regarding his transfer from Dane County Jail in Madison, Wisconsin, to the Federal Penitentiary in Terre Haute, Indiana, any claim arising from such facts sounds in tort either against the United States or its agents in their individual capacity. Olsen Compl. at 8-9. This Court has jurisdiction over neither type of suit. Surely the plaintiff is by now aware that the Court of Federal Claims lacks jurisdiction over tort claims against the government. Such actions can be brought only in the district courts. Because the Court dismisses the plaintiff's

claims on principles of res judicata as applied to jurisdiction, nothing in this opinion of itself prejudices any future action that the plaintiff may bring under the Federal Tort Claims Act in the district courts.

B. The plaintiff's motion for judgment on the pleadings

Accordingly, the plaintiff's motion to "strike" the dismissal motion, motion for judgment on the pleadings, and motion to proceed *in forma pauperis* must be denied.

C. The defendant's request to impose a filing limitation

In its motion to dismiss, the government asks that this Court impose "some filing limitation . . . upon Mr. Verdone to conserve judicial resources." Def.'s Mot. to Dismiss at 10. The defendant cites to *In re Martin-Trigona*, which concerned an especially vexatious litigant. 737 F.2d 1254, 1259 & n.4 (2d Cir. 1984) (over 250 actions filed). Although the Court is not without sympathy for the government's position and its desire to ensure the Court of Federal Claims's administrative well-being, the Court is nevertheless extremely reluctant to impose such a limitation on any litigant. The plaintiff has filed nine actions in this Court, eight of which were decided by the same judge at the same time. At this point, the Court is willing to chalk up the plaintiff's multiple filings to an earnest yet somewhat overzealous wish to vindicate what he perceives to be his rights. Perhaps now the plaintiff will acknowledge that it is in *his best interest* not to waste any further his time, the government's time, or the Court's time, in filing the same claims in this Court, when we are powerless to hear them. The defendant's request will be denied.

III. CONCLUSION

Because the Court holds that res judicata bars the plaintiff from reopening the issue of this Court's jurisdiction over his claims, the Court **GRANTS** the defendant's motions to dismiss. The Court **DENIES** the plaintiff's motion for judgment on the pleadings, motion to strike, and motion to proceed *in forma pauperis*. The Clerk is directed to close the case.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge