In the United States Court of Federal Claims

No. 08-700C

FILED UNDER SEAL

Filed: December 1, 2014

JAY ANTHONY DOBYNS,	*
	*
Plaintiff,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*

OPINION

On August 25, 2014, the court issued an opinion in the above case. On August 28, 2014, a judgment was rendered under RCFC 58. On October 24, 2014, defendant filed a notice of appeal. On October 27, 2014, plaintiff filed a notice of cross-appeal. On October 29, 2014, the court, invoking RCFC 60(b) and other provisions,[1] issued an order voiding the prior judgment based upon indications that defendant, through its counsel, had committed fraud on the court. On November 6, 2014, defendant filed a motion seeking to vacate this order. On November 12, 2014, plaintiff filed an opposition to defendant's motion. On November 13, 2014, the court granted defendant's motion to vacate the order voiding the judgment in this case.

On November 14, 2014, the court issued an order giving the parties an opportunity to clarify as to whether either party intended to file a motion to invoke the "indicative ruling" procedure in RCFC 62.1. On November 19, 2014, defendant declined to pursue this option. That same day, however, plaintiff filed a motion under RCFC 62.1 seeking such an indicative ruling. On November 25, 2014, defendant filed a response to plaintiff's motion.

[1] The court invoked RCFC 1 and RCFC 60(d)(3), as well as RCFC 60(b)(3) and RCFC 60(b)(4).

RCFC 62.1 allows this court to alert the Federal Circuit that it would consider or grant a motion if the case were remanded for certain purposes.[2] RCFC 62.1, like its Federal Rules of Civil Procedure counterpart, provides a procedure for the court to issue an "indicative ruling" on a motion for relief that is barred by a pending appeal.[3] In this regard, RCFC 62.1(a) provides:

> If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
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> (1) defer considering the motion;
>
> (2) deny the motion; or

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[2] *See United States v. Holmes*, 2013 WL 709053, at *1 (D. Colo. Feb. 25, 2013) (discussing Fed. R. Civ. P. 62.1); *Defenders of Wildlife v. Salazar*, 776 F. Supp. 2d 1178, 1184-85 (D. Mont. 2011) (same).

[3] Rule 62.1 is a fairly recent addition to the Federal Rules and, correspondingly, to the RCFC. The CFC version of the rule was adopted in 2010. The Advisory Committee notes accompanying the Federal rule explain its application, thusly:

> This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. . . .
>
> This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

Fed. R. Civ. P. 62.1 adv. comm. notes (2009); *see also* 11 Charles Alan Wright, Arthur R. Miller, May Kay Kane, Richard L. Marcus & Adam N. Steinman, Federal Practice & Procedure § 2911 (3d ed. 2014) (hereinafter "Wright & Miller").

> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

As can be seen, the rule anticipates the filing of a motion, which plaintiff recently filed here. *See also Defenders of Wildlife*, 776 F. Supp. 2d at 1182-86 (discussing the invocation of the similar Federal rule); *In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d 1060, 1065-66 (C.D. Cal. 2011) (same). While the RCFC 62.1 procedure appears not to have been invoked previously by this court, the Federal Circuit has, on at least five occasions, remanded cases to district courts based upon requests made under the comparable Federal rule. *See Resqnet.com, Inc. v. Lansa, Inc.*, 481 F. App'x 615 (Fed. Cir. 2012); *Karl Storz Imaging, Inc. v. Pointe Conception Med., Inc.*, 471 F. App'x 904 (Fed. Cir. 2012); *Ameranth, Inc. v. Menusoft Sys. Corp.*, 463 F. App'x 920 (Fed. Cir. 2012); *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 2011 WL 5275848 (Fed. Cir. Nov. 4, 2011); *Acoustic Techs., Inc. v. Itron, Inc.*, 428 F. App'x 996 (Fed. Cir. 2011).

For the reasons that follow, the court believes that it is appropriate to issue an indicative ruling pursuant to RCFC 62.1(a)(3), stating that it would grant a motion if the Federal Circuit were to remand this case for the purpose of allowing this court to consider a motion under RCFC 60(b)(3) or RCFC 60(d)(3). As will be discussed in greater detail below, that motion is based on evidence that defendant, through its counsel, may have committed fraud on the court, as described in either RCFC 60(b)(3) or 60(d)(3).

The standard for demonstrating that fraud on the court has occurred is demanding. "When alleging a claim of fraud on the court, [a party] must show by clear and convincing evidence that there was fraud on the court, and all doubts must be resolved in favor of the finality of the judgment." *Weese v. Schukman*, 98 F.3d. 542, 552 (10th Cir. 1996); *see United States v. Estate of Stonehill*, 660 F.3d 415, 443-44 (9th Cir. 2011); *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); 11 Wright & Miller, *supra*, at § 2860; *see generally*, *Addington v. Texas*, 441 U.S. 418, 424 (1979). Fraud on the court "is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996) (*quoting Bulloch v. United States*, 763 F.2d 1115, 1118 (10th Cir. 1985) (en banc)); *see also Lacks Indus. Inc. v. McKechnie Vehicle Components USA, Inc.*, 407 F. Supp. 2d 834, 847-88 (E.D. Mich. 2005); *Hall v. Doering*, 185 F.R.D. 639, 644 (D. Kan. 1999); Wright & Miller, *supra*, at § 2860.[4] Various cases indicate that once the record evidences a "colorable

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[4] The Sixth Circuit has indicated that fraud on the court consists of conduct:

> 1. On the part of an officer of the court; 2. That is directed to the 'judicial machinery' itself; 3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court.

claim of fraud," the court may exercise its discretion to permit discovery and evidentiary proceedings. *See Pearson v. First NH Mortg. Corp*, 200 F.3d 30, 35 (1st Cir. 1999). Of course, here, the availability of such procedures would be subject to a remand ordered by the Federal Circuit. For the reasons that follow, the court believes that proceedings to pursue a potential fraud upon the court are warranted.

First, a brief summary of the case in question is warranted. In this contract case, plaintiff, Jay Anthony Dobyns, then an agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), alleged that ATF officials breached a settlement agreement the parties had entered into resolving an employment dispute. Mr. Dobyns further alleged that ATF's conduct relating to the settlement agreement breached the covenant of good faith and fair dealing. In 2013, a three-week trial on these claims ensued, in which more than twenty ATF officials and agents testified. On August 25, 2014, this court issued a lengthy opinion finding that while defendant did not breach the settlement agreement, *Dobyns v. United States*, 118 Fed. Cl. 289, 313-16 (2014), defendant breached the covenant of good faith and fair dealing, *id.* at 317-21.[5] Employing the jury verdict method to determine the recovery here, the court concluded that plaintiff was entitled to damages for emotional distress and pain and suffering, in the amount of $173,000. *Id*. at 321-27. The court also rejected a government counterclaim, in which the latter asserted that plaintiff had breached his employment agreement with ATF by writing and publishing books based upon his experiences as an agent. *Id*. at 327-30. The court found, *inter alia*, that the ATF was aware of the contracts in question prior to the time that the settlement agreement in question was executed. *Id*.

The record reveals at least two instances of conduct by defendant's counsel that, in the court's view, provide indication that fraud on the court has occurred here. The first of these instances is well-documented in the record and can be found in this court's opinion in *Dobyns v. United States*, 118 Fed. Cl. 289 (2014). The relevant passage in question discusses actions taken by the ATF regarding further investigation of the arson at the Dobyns' house. In this regard, the opinion noted that: "In early 2012, Thomas Atteberry, the new [Special Agent in Charge] for the Phoenix Division, reopened ATF's investigation into the arson at Agent Dobyns' residence." *Id.* at 306. A footnote in the opinion then stated as follows:

> Testimony at trial indicated that Valerie Bacon, an attorney in ATF's Office of General Counsel, attempted to convince SAC Atteberry not to reopen the arson investigation. In this regard, SAC Atteberry testified:

Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993), *cert. denied*, 513 U.S. 914 (1994); *see also* 11 Wright & Miller, *supra*, at § 2860; 12 Moore's Federal Practice § 60.21(4)(a) (3d ed. 2014).

[5] The court's ruling in this regard relied heavily on the Federal Circuit's recent decision in *Metcalf Constr. Co. v. United States*, 742 F.3d 984 (Fed. Cir. 2014).

> Q. . . . Did you get any kind of discouragement in any respect from anyone at ATF with respect to reopening this arson investigation?
>
> A. Yes.
>
> Q. Please explain.
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> A. When I was seeking guidance to reopen the investigation, I had a phone conversation with somebody from Counsel's office in ATF headquarters.
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> THE COURT: Can you be more specific, Agent? Do you know who it was?
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> A. I believe it was Valerie Bacon.
>
> THE COURT: All right. Proceed.
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> A. I had a phone conversation, and I also believe I talked to her in person one time when she was in Phoenix, and I believe during the telephone conversation she made a comment to me that if you, meaning myself, reopen the investigation that would damage our civil case.

Id. n. 25. The same footnote continued:

> On or about March 21, 2013, defendant's attorneys (and their supervisors) received emails from plaintiff's attorney complaining about the contacts made by Ms. Bacon to SAC Atteberry. It appears that defendant's attorneys did not respond to these emails or take any action in response thereto. Neither party notified the court of these contacts until SAC Atteberry testified in court. In a filing subsequently ordered by the court, defendant's counsel acknowledged the contacts made by Ms. Bacon to SAC Atteberry, as well as to another potential witness in this case (Agent Carlos Canino). That filing suggests that Ms. Bacon had a discussion with Agent Canino that was similar to the one she had with SAC Atteberry, described above.

Id. Defendant's filings regarding this situation demonstrated not only that its counsel – including supervisors in the Civil Division, who received email communications on this topic from plaintiff's counsel in March of 2013 – were aware of Ms. Bacon's actions prior to the trial in this case, but did nothing to apprise the court of her actions or of the potential that the integrity of these proceedings were at risk. Indeed, the record suggests that the issues raised by Ms. Bacon were not truly brought to the court's attention until a recess after the testimony quoted above – in the midst of trial.[6]

[6] The court received further information from the parties regarding this topic in filings by defendant on July 1, 2013, and by plaintiff on July 2, 2013.

The record, unfortunately, also reveals that this is not the only instance in which defendant's counsel may have committed fraud on the court. On September 17, 2014, the court referred allegations of an *ex parte* communication in this case to the Deputy Attorney General of the United States. That communication, which included a taped conversation (a copy of which is part of the appellate record in this case), revealed that defendant's attorneys may have committed other violations of the duty of candor, including a potential failure to advise the court that an ATF agent who testified in this case[7] may have been threatened by another witness during the trial. The taped communication states that defendant's counsel ordered the agent in question not to communicate the threat to the court and stated that there would be repercussions if the agent did not follow counsel's instructions. This matter has since been referred to the Office of Professional Responsibility (OPR) at the Justice Department.[8]

The record indicates that there is much more involved here than a simple misstatement of fact, a fraudulent filing, or a failure to advise the court of a critical fact. *Compare United States v. Parcel of Land and Residence of 18 Oakwood Street*, 958 F.2d 1, 5 (1st Cir. 1992); *Pri-Har v. United States*, 215 F. Supp. 2d 404, 405-06 (S.D.N.Y. 2002). Rather, it appears that there is significant evidence that defendant's conduct may actually have subverted the judicial process in a way that would trigger application of RCFC 60(b)(3) and 60(d) – and that plaintiff has preliminarily demonstrated the '"exceptional circumstances' justifying the extraordinarily relief requested." *Employer Mut. Casualty Co. v. Key Pharm.*, 75 F.3d 815, 824-25 (2d Cir. 1996); *see also Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-45 (1944); *In re Genesys Data Techs., Inc.*, 204 F.3d 124, 130 (4th Cir. 2000); *Demjanjuk*, 10 F.3d at 352-54; *Potter v. Mosteller*, 199 F.R.D. 181, 185 (D.S.C. 2000), *aff'd*, 238 F.3d 414 (4th Cir. 2000). In the court's view, an indicative ruling to reflecting this state of affairs is warranted. Nothing that defendant has argued to this point suggests otherwise.

Based on the foregoing, the court hereby grants plaintiff's motion that the court issue an indicative ruling under RCFC 62.1. The court concludes that if, given the opportunity by the Federal Circuit, it would grant a motion to consider whether defendant's counsel has committed fraud on the court under RCFC 60(b)(3) or RCFC 60(d). *See* RCFC 62.1(c). If the Federal Circuit remands the action, the court will allow both parties an opportunity to present argument, as well as relevant evidence and other testimony, before ruling on a motion for reconsideration under RCFC 60. *See Hazel-Atlas Glass Co.*, 322 U.S. at 251; 11 Wright & Miller, *supra*, at § 2870.[9]

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[7] Critically, the witness in question was the author of several reports issued by ATF's Internal Affairs Division regarding the handling of various threats made against Agent Dobyns.

[8] On November 5, 2014, the court received a letter from OPR listing out the matters covered by the OPR inquiry and advising the court of the process that the office will follow in investigating this matter.

[9] The court notes that Rule 62.1 operates in conjunction with Federal Rule of Appellate Procedure 12.1, which provides that if the court, pursuant to Rule 62.1(a)(3), states that it would

The Clerk shall ensure that a copy of this ruling is provided to the United States Court of Appeals for the Federal Circuit.

IT IS SO ORDERED.

s/Francis M. Allegra
Francis M. Allegra
Judge

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either grant the motion on remand or that the motion raises a substantial issue, the movant must notify the circuit clerk. Fed. R. App. P. 12.1.