

In the United States Court of Federal Claims

No. 02-894 C
(Filed: January 16, 2003)

MARCIA FEE ACHENBACH, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

ORDER

Before the court is defendant's Motion to Dismiss and Motion to Stay Discovery or for a Protective Order Pending Resolution of Defendant's Motion to Dismiss. The grounds of defendant's Motion to Dismiss are that plaintiffs' claims are barred by the six-year statute of limitations established by 28 U.S.C. § 2501, and that the court lacks subject matter jurisdiction because plaintiffs have not stated a claim upon which relief can be granted. Defendant's Motion to Dismiss (Def.'s Mot. Dismiss) passim. The parties agree that the Motion to Stay Discovery is intertwined with these issues, but disagree as to the legal effect of this fact.

The Motion to Stay Discovery involves a request made by plaintiff for certain documents claimed to be in possession of the government. Specifically, plaintiff requests:

All transcripts, stenographic notes, memoranda, decrypts, and other written accounts of the transatlantic conversations between President Franklin Delano Roosevelt and Prime Minister Winston Churchill between the dates of June 1, 1941, and December 31, 1941.

Appendix to Plaintiffs' Reply to Defendant's Motion to Dismiss (Pls.' App.) Ex. 2, at 1-2; Appendix to Defendant's Motion to Stay Discovery or for a Protective Order Pending Resolution of Defendant's Motion to Dismiss (Def.'s App.) at 1-2. Plaintiff also requests that the government verify the transcript of what is alleged to be one of those conversations between the President and Prime Minister, during which the Pacific Theatre is discussed. Pls.' App. Ex. 2, at 2-6; Def.'s App. at 2-6.

Defendant argues that no facts can be developed that will support plaintiff's opposition to its Motion to Dismiss. Defendant's Motion to Stay Discovery or for a Protective Order Pending Resolution of Defendant's Motion to Dismiss (Def.'s Stay) at 1. Defendant concedes that the court must accept as true all well-pleaded facts contained in the complaint in resolving the motion to dismiss, and therefore contends that the issue before the court is a legal one. Id. at 3-4. Further, defendant argues that "[w]hether there exist any documents that could assist plaintiff to 'prove' their case is irrelevant to a determination of whether the statute of limitations can be tolled." Id. at 8 (citing Welcker v. United States, 752 F.2d 1577, 1581 (Fed. Cir.), cert. denied, 474 U.S. 826 (1985)). Because jurisdiction is a preliminary matter that must be addressed before the court can look into plaintiff's substantive claims, defendant contends that any fact discovery is unnecessary at this juncture. Id. at 9.

Plaintiffs argue that fact discovery is essential to its claims, and cannot be separated from the jurisdictional issues raised in the Motion to Dismiss. Opposition to Defendant's Motion to Stay Discovery (Pls.' Stay Opp.) passim. Central to plaintiffs' claims in this case is what is termed the "smoking gun:" transcripts of transatlantic telephone conversations between President Roosevelt and Prime Minister Churchill from June to December, 1941, which plaintiffs claim will show that the United States government "deliberately chose to sacrifice the lives and property of the plaintiffs for the greater good of convincing the general public that the United States must enter the war against the Axis powers." Reply to Defendant's Motion to Dismiss (Pls.' Dismiss Opp.) at 18-19. Plaintiff contends that these facts will establish subject matter jurisdiction for the court. Id. at 17. Plaintiff argues that the statute of limitations must be tolled because the government purposefully concealed this information. Id. at 19. Accordingly, the discovery request at issue, plaintiff contends, is essential to establishing jurisdiction in this case. Pls. Stay Opp. at 6-8.


The court first notes that if it can be shown by a preponderance of the evidence that "the government fraudulently or deliberately conceal[ed] material facts relevant to a plaintiff's claim so that the plaintiff is unaware of its existence and could not have discovered the basis of his claim," the statute of limitations will be tolled. Hair v. United States, 52 Fed. Cl. 279, 284 (2002). Because of plaintiffs' allegations, however, the court

assumes as true for purposes of the statute of limitations the allegation that the government did conceal such information. Therefore, the court does not believe that any development of factual discovery related to the alleged concealment will be helpful in resolving the statute of limitations defense raised by defendant. Nor does the court believe that the discovery sought will aid in the subject matter jurisdiction dispute. The dispute on the ground of subject matter jurisdiction will be resolved by deciding whether plaintiff's factual allegations in their complaint are well-pleaded, not whether those facts can be proven at trial. Accordingly, defendant's Motion to Stay Discovery is GRANTED pending resolution of the Motion to Dismiss.

The court believes it will be assisted in resolving the Motion to Dismiss by additional briefing. A key issue will be when the statute of limitations began to run in this case, as noted above. If the court assumes based on the complaint that the government did conceal material facts from plaintiffs, the dispositive issue will be when plaintiff became, or should have become, aware that it had a claim. The dispute involves, inter alia, the availability to plaintiffs of a translation of the "smoking gun," a conversation between President Roosevelt and Prime Minister Churchill. In its Appendix to its Reply to Plaintiff's Response to Defendant's Motion to Dismiss (Def.'s Reply App.), defendant referenced an article that appeared in American Heritage magazine. Def.'s Reply App. at 1-4. This article discussed a book which contained "a full English transcript of [a conversation between President Roosevelt and Prime Minister Churchill] . . . made available to any researcher or historian . . ." Id. at 3. For ease of reference, the court has attached an excerpt from this book to this order.

The parties are ordered to brief the relevance of this book to the statute of limitations issue before the court. Defendant's opening brief shall be due on Friday, February 14, 2003, with plaintiffs' response due on Friday, February 28, 2003, and defendant's reply due on Friday, March 7, 2003. Upon completion of this briefing, the parties will be given the opportunity for oral argument on defendant's Motion to Dismiss.

IT IS SO ORDERED



Emily C. Hewitt
Judge