

In the United States Court of Federal Claims

No. 12-849C

(Filed: November 22, 2016)*

***Opinion originally filed under seal on November 7, 2016**

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| JOHN DOE, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Motion for Summary Judgment; RCFC |
| |) | 56; Government Informant; Narcotics |
| THE UNITED STATES, |) | Rewards Program; 22 U.S.C. § 2708; |
| |) | Secretary of State Approval |
| Defendant. |) | |
| |) | |

Thomas M. West, Bethlehem, GA, for plaintiff.

Alison Vicks, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, with whom were *Steven J. Gillingham*, Assistant Director, *Robert E. Kirschman, Jr.*, Director, and *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, for defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case is before the court on the United States government's ("the government") motion for summary judgment under Rule 56 of the Rules of the Court of Federal Claims ("RCFC"). The plaintiff, an informant for the Drug Enforcement Administration ("DEA") in [xxxxxx] referred to in this opinion as "John Doe," alleges in his amended complaint that the government is liable for breach of contract for failing to pay him a reward under the Department of State Narcotics Rewards Program, which is

codified at 22 U.S.C. § 2708 (2012) (“section 2708” or “the Act”)¹. Under section 2708, the Secretary of State in his sole, unreviewable, and non-delegable discretion is authorized to make rewards to individuals that provide information leading to the arrest of narcotic traffickers. The plaintiff alleges that he provided information that led to the arrest of a significant narcotics trafficker in Colombia and that agents from the DEA and later Immigration and Customs Enforcement (“ICE”) agreed to secure a \$2.5 million reward for him under section 2708. The plaintiff asserts that the failure to pay the reward gives rise to a breach of contract claim in the amount allegedly promised to him. The government argues that under section 2708, no DEA or ICE agents could have bound the government to pay plaintiff a \$2.5 million reward because no one other than the Secretary of State had the authority to authorize a reward in that amount under the Act. The government further argues that the Secretary of State never ratified any promise to pay plaintiff because the undisputed evidence shows that the Secretary has never received a

¹ Title 22 U.S.C. § 2708, known as the “Department of State rewards program” is “designed to assist in the prevention of acts of international terrorism, international narcotics trafficking . . . and other related criminal acts.” 22 U.S.C § 2708(a)(2). The program provides that “[i]n the sole discretion of the Secretary [of State] . . . and in consultation . . . with the heads of other relevant department or agencies” including the Department of Justice, the discretion to pay a reward of up to \$25 million to any “individual who furnishes information leading to . . . the arrest or conviction in any country of any individual for committing . . . any narcotics-related offense if that offense involves . . . a violation of United States narcotics laws. . . .” *Id.* § 2708(b)(3)(A). Under the Act, “[a] reward . . . of more than \$100,000 may not be made without the approval of the Secretary [of State].” *Id.* § 2708(e)(2). In addition, “[t]he authority to approve rewards of more than \$100,000 . . . may not be delegated.” *Id.* § 2708(e)(4). Finally, the Act states that “[a] determination made by the Secretary under this section shall be final and conclusive and shall not be subject to judicial review.” *Id.* § 2708(j).

request for payment of a reward to plaintiff under the procedures established for paying rewards under section 2708.²

For the reasons that follow, defendant's motion for summary judgment is

GRANTED.

I. BACKGROUND

A. STATUTORY AND REGULATORY BACKGROUND

In 1986, Congress granted the Secretary of State the power to establish a Narcotics Rewards Program in order to pay cash rewards for tips leading to the arrest of narcotics traffickers outside the jurisdiction of the United States. 22 U.S.C. § 2708. The Secretary is authorized, at his or her sole discretion, to pay an individual a reward for information leading to the arrest in any country of a major violator of United States narcotics law. *Id.* § 2708(b)(3)(A). The maximum reward for a narcotics arrest is \$25,000,000, and any award in excess of \$100,000 must be personally approved by the Secretary of State. *Id.* § 2708(e)(1)-(2). By law, the Secretary may not delegate the authority to approve awards greater than \$100,000 to any person. *Id.* § 2708(e)(4). Finally, “[a] determination made by the Secretary [with regard to payment of a reward] . . . shall be final and conclusive and shall not be subject to judicial review.” *Id.* § 2708(j).

State Department officials and officers of ICE and DEA may propose reward offers for information leading to the arrest of narcotics traffickers. *See* 2 FAM §

² As discussed above, the process for securing approval of rewards under section 2708 are laid out in the State Department's Foreign Affairs Manual. 2 U.S. Dep't of State Foreign Affairs Manual §§ 950-54 (2013).

953.1(a). However, no such officer may offer or promise a reward without express approval from the Bureau of International Narcotics and Law Enforcement Affairs (“INL”) and the Secretary of State. 2 FAM § 953.2(c). The INL is responsible for managing the reward program. When an agency proposes to offer a reward, the State Department may allocate Narcotics Rewards Program funds to advertise the reward in a foreign country. 2 FAM § 953.2(a).

If an informant’s tip leads to the arrest of a narcotics fugitive, DEA or ICE officers are authorized to submit a reward proposal, specifically detailing the informant’s contribution, to the Chief of Mission of the U.S. Embassy in the involved country. 2 FAM § 953.4(a). If the Chief of Mission approves the reward proposal he then forwards the proposal to the appropriate government offices for review, including the Department of Justice and the Narcotics Rewards Program Committee. 22 U.S.C. § 2708(c)(2) (“Before making a reward under this section in a matter over which there is Federal criminal jurisdiction, the Secretary of State shall obtain the concurrence of the Attorney General.”). If the Committee recommends a reward, the INL presents the recommendation to the Secretary of State, who has final and exclusive discretion to authorize a reward. 2 FAM § 953.5, 953.7(a). Neither Section 2708 nor the Foreign Affairs Manual dictates a timetable for making a determination. *See generally* 22 U.S.C § 2708; 2 FAM §§ 950-54. If the Secretary does not approve a reward proposal, the Committee must communicate to ICE or DEA the basis for the denial. 2 FAM § 953.5(f). For approved rewards, the Bureau of the Comptroller and Global Financial

outstanding questions before it can be submitted to the [State] Department for formal consideration.” [xxxxxxx] Decl. ¶ 7.

Both the government and plaintiff have filed conflicting affidavits regarding various meetings between the plaintiff and federal government agents. The plaintiff filed declarations stating that he met with federal government agents who promised him the reward. *See generally* Pl.s’ Response App’x. (ECF No. 51). The government has filed declarations from the identified agents, who state that none of them promised plaintiff the reward. Def.’s App’x. at 2, 10, 73-74 (ECF No. 45).

However, not disputed that, in 2013, ICE endeavored to find out what had happened with the request for reward that had been submitted for plaintiff. Emails from ICE management show that ICE was told that more information was needed to complete the submission. Specifically, ICE was told that to complete the submission more information would be needed regarding how the plaintiff obtained information on [xxxxx]’s location and whether any DEA agents assisted in the arrest. Def.’s App’x. at 48 (ECF No. 45). However, because necessary information has apparently never been submitted, the request for reward remains “pending/inactive.” [xxxxxxx] Decl. ¶ 7. Accordingly, the request has not been submitted to the Secretary of State.

The government filed the present motion for summary judgment on April 29, 2016 (ECF No. 45). Briefing was completed on August 19, 2016. The court heard oral argument on November 1, 2016.

II. LEGAL STANDARD

The court shall grant summary judgment when a movant shows that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. RCFC 56(a). A material fact is one that might alter the outcome of a suit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order to establish that a fact is or cannot be disputed, a party must cite to particular parts of materials in the record. RCFC 56(c). When a party moves for summary judgment before discovery and “a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to obtain affidavits or declarations or to take discovery.” RCFC 56(d). However, a court may grant summary judgment before discovery where the party opposing summary judgment only baldly speculates that wrongful conduct occurred. *See T & M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999).

III. DISCUSSION

In order to establish a binding express or implied-in-fact contract with the government, a plaintiff must show (1) mutuality of intent; (2) consideration; (3) lack of ambiguity in the offer and acceptance; and (4) actual authority on the part of the government’s representative to bind the government in contract. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). “Absent actual authority on the part of the [g]overnment’s agent to bind the [g]overnment in contract, no binding contract can exist, regardless of the agent’s representations.” *Doe v. United States*, 100 F.3d 1576, 1584 (Fed. Cir. 1996). The government is not bound by the acts of its agents beyond the

scope of their authority. *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998). “The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation” *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). Individuals contracting with the government bear the risk of correctly ascertaining that the government agent has actual authority to bind the government. *Id.* at 384; *City of El Centro*, 922 F.2d at 829. Where the agent acting on behalf of the government lacks authority, the government may be bound if a superior with contracting authority “ratifies” the unauthorized agreement. *Harbert/Lummus*, 142 F.3d at 1433. To show that an unauthorized agreement has been “ratified” there must be evidence to show that a person with authority knows the fact of the unauthorized contract and has approved the agreement. *Id.*

Tested by these standards the government is entitled to summary judgment in this case. Based on the undisputed facts, the plaintiff cannot show that there is a genuine issue of material fact as to whether the federal agents he allegedly contracted with had authority to bind the government. Nor can the plaintiff show on this record any genuine issue of material fact that the Secretary of State ratified any promise to provide plaintiff with a reward under section 2708.

Plaintiff claims that he is entitled to a reward under the Department of State Narcotics Rewards Program, 22 U.S.C. § 2708 (2012), on the grounds that he received a binding and enforceable promise from federal agents that he would receive a reward for \$2,000,000 (the amount ICE submitted in its proposal) or \$2,500,000 (the amount plaintiff alleges agents promised to secure for him) in exchange for information that led

to the arrest of a narcotics trafficker. The fatal flaw in plaintiff's case is that, under section 2708, the only person with authority to authorize such a reward is the Secretary of State. In addition, as discussed above, the Secretary of State is explicitly forbidden by statute from delegating reward authority for rewards over \$100,000 to any person. 22 U.S.C. § 2708(e)(4). Thus, under the statutory scheme the Secretary of State is the sole individual with authority to ratify the proposed reward. Because it is not disputed that the Secretary of State has not authorized or ratified the proposed reward to plaintiff, the government is entitled to summary judgment.

The undisputed evidence establishes that the Secretary of State has not received or approved the \$2.5 million reward plaintiff claims he was promised. Plaintiff's reliance on the promises of various federal agents to support his breach of contract claim is misplaced. Regardless of whether any federal agents promised a \$2,500,000 reward to plaintiff, no DEA or ICE agent was authorized to make such a promise under section 2708. In addition, it is not relevant whether superiors at the DEA and ICE knew of the agent's actions and approved of the reward promise. No one at ICE or DEA was authorized to approve or ratify a reward promise. By law, only the Secretary of State is authorized to approve or ratify a reward promise for over \$100,000. Because the undisputed evidence demonstrates that the request to pay a reward to plaintiff has not been presented to the Secretary of State, plaintiff cannot establish a legally enforceable claim to the alleged reward.

To the extent the court now understands that plaintiff may be also arguing that he has a contract right to have his reward proposal presented to the Secretary of State, that

claim also fails as a matter of law. There is nothing this court can do to require ICE or its agents to submit the information apparently missing from the plaintiff's reward proposal to the Department of Justice any more than the court can force the Secretary of State to consider a reward request. The Federal Circuit has made clear that "[e]xcept in strictly limited circumstances . . . there is no provision in the Tucker Act authorizing the Court of Federal Claims to order equitable relief." *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000) (citing 28 U.S.C. § 1491(b)(2)). Having determined that no contract exists, the court lacks jurisdiction to order further action on plaintiff's proposal. In *Stevens v. United States*, the Federal Circuit found that the Court of Federal Claims lacked jurisdiction to provide plaintiff an opportunity to testify before Congress despite the fact that plaintiff may have exhausted all other avenues of relief. 367 F. App'x 158, 160-61 (Fed. Cir. 2010). The court found that the "only source of law [plaintiff] has relied on is contract law, and as discussed above, there is no evidence of a contract to support his claim." *Id.* at 161. The decision to grant a reward rests within the sole unreviewable discretion of the Secretary of State under section 2708(j). Without such a decision from the Secretary, there can be no contract. The plaintiff cannot circumvent the statute by claiming a right to damages when federal agents fail to submit a reward proposal to the Secretary.

Though plaintiff moved for additional discovery in his response to the government's motion, asking the court to compel the government to produce "all documents concerning the reward offer in this case, communications between government agencies concerning the progress of the reward, identification of government

agents who had authority or ratified the reward in this case, and the regulations that governed this reward offer and the progression of the payment of the reward,” Pl.’s Response at 10, the court finds that granting such a motion would be futile. None of the evidence plaintiff seeks could alter the fact that the agents plaintiff spoke with lacked authority to bind the government. Accordingly, the plaintiff cannot present any genuine issues of material fact to show that failing to present a reward proposal to the Secretary of State gives rise to a breach of contract claim, with or without additional discovery.

IV. CONCLUSION

For the above-stated reasons the government’s motion for summary judgment is **GRANTED**. The clerk shall enter judgment accordingly. No costs.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Senior Judge