

2:12-CV-1595

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

VITTI & VITTI & ASSOCIATES, P.C.)
)
Plaintiff,)
)
v.)
)
UNITED STATES,)
)
Defendant.)

No. 13-459
(Judge Braden)

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WEST. DIST. OF PENNSYLVANIA

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Rule 7.2(b)(2) of the Rules of the United States Court of Federal Claims and this Court's Order, dated October 18, 2013, defendant respectfully submits this reply in support of its motion to dismiss plaintiff Vitti & Vitti & Associates, P.C.'s (Vitti) complaint for lack of subject matter jurisdiction. In our motion, we demonstrated that the Court does not possess jurisdiction to entertain Vitti's complaint because (1) the Court does not possess jurisdiction to entertain tort claims and (2) Vitti fails to allege or demonstrate that it is in privity of contract with the Government and further because it fails to sufficiently identify the contract and the substantive contractual provisions upon which it relies, two requirements for establishing this Court's jurisdiction over a breach of contract claim.

In its response to our motion, Vitti virtually ignores the threshold issue of jurisdiction and the arguments made in our motion. Vitti focuses instead on the elements of a negligence claim, tort law, and its contentions as to why the Government is purportedly liable in tort. See Pl. Resp. at 8 (discussing the elements of a claim for negligence); 9 (citing cases that discuss tort claims); 10 (discussing tort principles: duty, standard of care, and foreseeability of injury); 11 (discussing liability under the Federal

Tort Claims Act). In its twelve page response, there is only one reference to this Court's jurisdiction: a sentence that summarily concludes, without supporting factual or legal authority, that this Court possesses jurisdiction to entertain Vitti's complaint because "the action is founded upon [G]overnment contract." Pl. Resp. at 11. Vitti's conclusory assertion that this case is based upon a contract with the Government is insufficient to establish this Court's jurisdiction.

I. Vitti's Complaint Sounds In Tort And Thus Should Be Dismissed

In its response, Vitti effectively concedes that the true nature of its claim sounds in tort. Notably, the entirety of its twelve page response focuses on its negligence claim and is void of any discussion of a contract or contractual obligations. *See* Pl. Resp. at 8-12¹; *see also Moore v. Durango Jail*, 77 Fed. Cl. 92, 96 (2007) (holding that the Court of Federal Claims did not have jurisdiction over plaintiff's claim because "plaintiff's claim of negligence sounds in tort"). Indeed, this case arises out of an administrative tort claim that Vitti filed with the Department of Veterans Affairs (VA). Pl. Resp. at 7; Pl. Compl. ¶ 1 (requesting money damages based on the "negligence of Defendant, failure of the Defendant to perform as required and denial of the [tort] claim of Plaintiffs in the

¹ Vitti raises for the first time in its response to our motion to dismiss the allegation of a breach of a fiduciary duty stemming from a "trust relationship." Pl. Resp. at 11. To the extent that Vitti is allowed to raise a new claim in its response motion, which it should not be permitted to do, Vitti's claim arising out of defendant's purported breach of a fiduciary duty fails to establish jurisdiction in this Court because Vitti has not alleged or demonstrated that the purported duty is grounded in a contractually based obligation to Vitti. *See Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977) ("[P]laintiffs' claim for damages arising out of defendant's breach of a fiduciary duty must be grounded in a contractually based obligation to plaintiffs to succeed here."); *American Insurance Co. v. United States*, 62 Fed. Cl. 151, 158-59 (2004) (citing Federal Circuit and Court of Federal Claims cases for the proposition that "general breaches of claimed fiduciary . . . duties are ordinarily viewed as giving rise, if anything, to torts, the subject matter of which plainly is outside this [C]ourt's jurisdiction.").

appropriate administrative proceedings.”). Despite its concession that its case sounds in tort, Vitti makes no attempt, nor can it, to distinguish any of the authorities that the Government cited in its motion to dismiss establishing that tort claims fall outside the jurisdiction of this Court, or to otherwise explain why this Court possesses jurisdiction over its tort claim.

II. Vitti’s Conclusory And Unsupported Assertion That This Case Is Based On A Government Contract Is Insufficient To Establish Jurisdiction In This Court

Although this Court generally possesses jurisdiction over breach of contract claims against the United States, Vitti has not met the threshold requirements for establishing the Court’s jurisdiction over its breach of contract claim in this case. Even after we identified the deficiencies in Vitti’s claim, *see* Def. Mot. at 8-9, Vitti has not come forward with the requisite facts, evidence, or allegations to establish this Court’s jurisdiction. Not only does Vitti fail to demonstrate in its complaint or response that it is in privity of contract with the Government, but it fails to satisfy the most basic requirement of specifically identifying the contract or the substantive contractual provisions upon which its breach of contract claim is based. Vitti has not identified, or produced, the contract that it contends VA entered into with the Pennsylvania Housing Finance Agency², *see* Pl. Compl. ¶ 8, nor has it identified any contractual provisions that

² Vitti erroneously states in the “Background” section of its response, that it raised in its complaint filed with this Court “a contract claim alleging that the ‘VA entered into an agreement [with Plaintiffs] to convey the property valued at \$48,000’ and that this agreement was allegedly breached.” Pl. Mot. at 7-8. The complaint that Vitti filed in this Court does not allege that Vitti entered into an agreement with the VA, nor has Vitti identified any such agreement in its complaint or response to our motion. It appears that Vitti’s background section was copied from the Government’s motion to dismiss that was filed in the United States District Court for the Western District of Pennsylvania—in which the Government contended that Vitti failed to produce or specifically describe the

would entitle it to relief. In the absence of such a showing Vitti cannot maintain its action in this Court. *See Kissi v. United States*, 102 Fed. Cl. 31, 35 (2011) (no jurisdiction to entertain breach of contract claim where plaintiff failed to show he had a contract with the Government and failed to adequately plead a contract claim under Rule 9(k) of this Court's rules). Particularly, when, as here, the Government has challenged the facts establishing jurisdiction, *see* Def. Mot. at 8-9, Vitti, as plaintiff, bears the burden of affirmatively showing that the Court possesses jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747-48 (Fed. Cir. 1988). Because Vitti has failed to satisfy its burden of establishing subject matter jurisdiction by a preponderance of the evidence, its complaint should be dismissed.

CONCLUSION

For these reasons and the reasons in our moving motion, we respectfully request that the Court dismiss Vitti's complaint for lack of subject matter jurisdiction.

Respectfully submitted,

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Acting Director

/s/ Steven J. Gillingham
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Assistant Director

alleged "agreement" it purportedly had with VA—and was not modified to accurately represent the allegations that have been presented in the complaint that Vitti filed in this Court. *See Vitti & Vitti & Associates v. United States Dep't of Veterans Affairs*, No. 12-1595 (W.D. Pa filed Nov. 1, 2012) Dkt. No. 12 at pp. 8, 15. Vitti presumably did not make the same allegation in this case because it is aware that no such agreement exists.

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