

No. 07-55091
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DR. NIRA SCHWARTZ dba)
JAFFA OPTRONIX,)
Plaintiff-Appellee)
v.)
UNITED STATES OF AMERICA;)
MIT LINCOLN LABORATORY;)
LAWRENCE LIVERMORE)
LABORATORY and AEROSPACE)
CORPORATION)
Defendants-Appellants)
_____)

MOTION BY DEFENDANT UNITED STATES FOR SUMMARY
AFFIRMANCE AND STAY OF BRIEFING SCHEDULE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CV 06-04010 DDP (JCx)

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I. INTRODUCTION

Defendant-appellee United States moves for summary affirmance of the district court's order granting the United States' motion to dismiss the complaint of *pro se* plaintiff-appellant Dr. Nira Schwartz ("Dr. Schwartz"). Circuit Rule 3-6(b) provides that summary affirmance is proper where "it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings." The outcome of this appeal is "obviously controlled by precedent" and the "insubstantiality of the appeal is manifest from the face of appellant's brief." See United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982)(per curiam). Accordingly, summary affirmance is appropriate.

II. COURSE OF PROCEEDINGS BELOW

In the instant action, Dr. Schwartz filed her complaint on June 30, 2006 in Dr. Nira Schwartz dba Jaffa OptroniX v. United States of America, et al., CV 06-04010 DDP (JCx) ("Instant Action"). (A copy of the complaint in the Instant Action is attached hereto as Exhibit A.) The gravamen of the Instant Action is essentially the same as that of another action filed by Dr. Schwartz on April 29, 1996, U.S. ex rel. Schwartz v. TRW, Inc. & Boeing North America, Case No. CV-96-3065 RSWL (RMCx) ("TRW Action"), in which the United States intervened and successfully moved to dismiss Dr. Schwartz's False Claims Act, 31

U.S.C. §3729 *et seq.*, allegations against TRW with prejudice. (A copy of the Sixth Amended Complaint in the TRW Action is attached hereto as Exhibit B, and a copy of the order dismissing the TRW Action is attached hereto as Exhibit C.)

The Instant Action is also essentially the same as a third action filed by Dr. Schwartz in January 2003, this time in the Court of Federal Claims, Schwartz v. United States, No. 03-37C (Fed. Cl.) (“Court of Claims Action”). The Court of Federal Claims dismissed that action because, *inter alia*, Dr. Schwartz failed to allege an enforceable contract against the United States. A copy of the order dismissing the Court of Claims Action is attached hereto as Exhibit D.

The complaint in the Instant Action alleges eight causes of action for: (1) declaratory judgment (Count I, 18:21-20:13.); (2) specific performance (Count II, 20:15-21:2.); (3) replevin (Count III, 21:4-9); (4) breach of trust (Count IV, 22:11-24:11); (5) accounting (Count V, 24:12-25:7); (6) money had and received (Count VI, 25:8-26:14); (7) conversion and trade secret misappropriation (Count VII, 26:16-30:17; and (8) unfair competition (Count IX [sic], 30:19-32:12.) Dr. Schwartz seeks general and special damages, disgorgement and restitution, double damages, preliminary and permanent injunctive relief, and punitive damages. (See Exhibit A, 32:14-33:11.)

The United States moved to dismiss the Instant Action pursuant to Fed.R.Civ.P. 12(b)(1) on the grounds that: (1) there is no subject matter jurisdiction over Dr. Schwartz' claims under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA") because she failed to exhaust her administrative remedies; (2) there is no subject matter jurisdiction over Dr. Schwartz's copyright infringement claims because, pursuant to 28 U.S.C. § 1498(b), exclusive jurisdiction for such claims lies in the Court of Federal Claims; and (3) to the extent Dr. Schwartz's claims in the Instant Action are construed as contract claims, the Court of Federal Claims already has ruled that she has not alleged an enforceable contract against the United States. Moreover, exclusive jurisdiction over such claims in excess of \$10,000 lies in the Court of Federal Claims pursuant to the Tucker Act.

On December 13, 2006, the district court granted the motion to dismiss ("Order"). (A copy of the Order is attached hereto as Exhibit E.)

III. SUMMARY AFFIRMANCE IS PROPER IN THIS CASE

A. The District Court Correctly Ruled That The United States Has Not Waived Sovereign Immunity As To Any Of Dr. Schwartz' Claims In The Instant Action

The district court ruled that: (1) the United States cannot be sued without its consent; (2) only Congress can waive sovereign immunity by enacting statutes

consenting to suit; and (3) any such waiver must be strictly construed. (See Exhibit E, 5:9 - 23, citing United States v. Dalm, 494 U.S. 596, 608 (1990); United States v. Sherwood, 312 U.S. 584, 587 (1941).) Nothing in Dr. Schwartz' informal opening brief suggests that the district court misconstrued the law.

After noting that Dr. Schwartz was obliged to allege a waiver of sovereign immunity to state a claim against the United States, the district court proceeded to analyze each possible waiver in the complaint in the Instant Action, and found that there was no waiver, and thus no subject matter jurisdiction. (See Exhibit E, 8:6-8.)¹

B. The Instant Action Complaint Fails To State A Claim Under The FTCA Because No Administrative Claim Was Filed

Prior to filing suit under the FTCA, a plaintiff must first file an administrative claim; that claim must either be denied or six months must elapse before filing suit. 28 U.S.C. § 2675(a). This requirement is jurisdictional: if a plaintiff has failed to exhaust her administrative remedies, the district court action must be dismissed. McNeil v. United States, 508 U.S. 106, 113 (1993); Jerves v.

¹ The district court also granted the Fed.R.Civ.P. 12(b)(6) motion brought by defendants-appellees MIT Lincoln Laboratory, Lawrence Livermore National Laboratory and Aerospace Corporation. (Order, 8:9-14:2.)

United States, 966 F.2d 517, 519 (9th Cir. 1992)(internal citations omitted); Brady v. United States, 211 F.3d 499, 502-03 (9th Cir. 2000).

As the district court noted, the United States introduced a declaration in support of its 12(b)(1) motion which showed Dr. Schwartz had not filed an administrative claim. (See Exhibit E, 6:17-18.) Dr. Schwartz did not introduce any evidence to prove that she had filed the prerequisite administrative claim. Thus, the district court correctly concluded it did not have jurisdiction over the alleged tort claim.

C. Contract Claims Against The United States In Excess Of \$10,000 Must Be Filed In The Court Of Federal Claims

The district court properly ruled that the Court of Federal Claims has exclusive jurisdiction over all contract claims against the United States in excess of \$10,000. (See Exhibit E, 6:24-7:3, citing Marceau v. Blackfeet Housing Authority, 455 F.3d 974, 986 (9th Cir. 2006).) Dr. Schwartz has not contested the district court's statement of the law either in the district court or on appeal. Therefore, summary affirmance of the dismissal of the contract claim is appropriate.

D. Any Copyright Claim Against The United States Must Be Brought In The Court of Federal Claims

Pursuant to 28 U.S.C. § 1498(b), any copyright claim against the United States must be brought in the Court of Federal Claims. (See Exhibit E, 7:5-12).

Dr. Schwartz has failed to present any statutory or case law to contest the district court's finding. Accordingly, dismissal of the copyright claim should be affirmed.

E. Dr. Schwartz' Claims Are Barred By Res Judicata and Collateral Estoppel

A claim is barred from re-litigation by res judicata and collateral estoppel where the prior litigation: (1) involved the same parties or their privies; (2) was terminated by a final judgment on the merits; and (3) involved the same claim or cause of action as the later suit. Hydranautics v. Filmtec Corporation, 204 F.3d 880, 888 (9th Cir. 2002).

Dr. Schwartz' False Claims Act claims were resolved against her with prejudice in the TRW Action. (See Exhibit C, 1:25 - 2:2.) Moreover, the Court of Federal Claims dismissed her breach of contract claim against the United States on substantive grounds. (See Exhibit D, pp. 9 - 12.) Thus, the district court properly found that insofar as Dr. Schwartz seeks to reinstate and relitigate issues concerning her False Claims Act or contract claims, res judicata and collateral estoppel bar the action.

Because there is no substantial question raised as to the lack of jurisdiction in the district court, dismissal should be summarily affirmed. Hooten, supra, 693 F.2d at 858.

IV. MOTION FOR STAY OF BRIEFING SCHEDULE

The United States moves this Court to stay the briefing schedule until this motion is decided. The Court has already received Dr. Schwartz' brief. The United States' answering brief is now due to be filed on July 9, 2007,

Dated: July 6, 2007

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