NO. 33018-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MIDDLEWORTH,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

REPLY BRIEF

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TABLE OF AUTHORITIES

UNITED STATES DISTRICT COURT CASES

A. REPLY ARGUMENT

THE RESPONDENT'S BRIEF FAILS TO SHOW THAT MR. MIDDLEWORTH IS NOT ENTITLED TO DNA TESTING IN ORDER TO PROVE HIS INNOCENCE.

Mr.Middleworth notes that the Respondent is in error in asserting that Middleworth has failed to show that the alleged herpetic lesion swabs are in the possession of the Washington State Patrol Crime Laboratory. See Brief of Respondent, at pp. 2-4.

However, as Mr. Middleworth argued in his Opening Brief, he seeks preservation of that swab evidence – a request he has been making since his December 29, 2014 filing. See Personal Restraint Petition for Post Conviction DNA/PCR Testing and Preserving Evidence.

The swabs in question have been asserted by Mr. Middleworth to be in possession of the State:

> The record of trial confirms that swabs were taken from Mr. Middleworth's lesions, indicating that nurse Alysa Reynolds of St. Mary's Medical Center took multiple swabs in the presence of law enforcement officers, and the kit was then handed over to the officers. Mr. Middleworth avers that the kit is in the possession of the Walla Walla County Prosecutor, the College Place Police Department, or the Crime Laboratory. RP 776-84 (testimony of College Place Police Department Lieutenant Robert Dutton); RP 790-97 (testimony of Reynolds).

Appellant's Opening Brief, at p. 9. Notably, it was Mr. Middleworth who found himself forced to seek, by motion, an order to the State to respond to his motions. Appendix A.

Importantly, the testing that Robert Middleworth seeks would indeed provide significant new information, which is what the Statue requires.

Thus, contrary to the State's assertions, the import of testing of the swabs is clear – this testing could determine the DNA of the virus. See generally Thermogen, Inc. v. Chou, No. 98 C 1230, 1998 WL 325197, at *1 (N.D. Ill. June 8, 1998) ("In October 1996, Chou started working on a grant application for a research project involving novel therapeutic use of the herpes simplex virus system to treat human cancer. [Specifically], the project entailed genetic engineering of herpes virus DNA to incorporate specific genes that allow the virus to invade and destroy tumor cells.").[1]

B. CONCLUSION

This Court should reverse the trial court's order denying Mr. Middleworth's motion for preservation of evidence and PCR DNA testing.

DATED this 9th day of February 2016.

[1] Attached as Appendix B.

Respectfully submitted,

s/ OLIVER R. DAVIS _
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Appendix A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

State of Washington, Plaintiff, vs. Robert J. Middleworth, Defendant.	Case No. 10-1-00287-9 Motion to Produce Response to Defendants Request for RCW 10.73.170 Postconviction DNA/PCR Testing.

To the Clerk
To the Superior court of Walla Walla

COMES NOW, the defendant Robert J. Middleworth requesting the WALLA WALLA CO SUPERIOR COURT, and its CLERKS, to produce to the defendant, Robert J. Middleworth, its response to defendants Postconviction DNA/PCR testing motion, and all other motions filed in the matter of defendants Postconviction DNA/PCR testing motions.

Furthermore, defendant is requesting the Clerk of Walla Walla Co Superior Court to produce this response "VIA" Legal Mail, to the defendants current address at:

Coyote Ridge Corrections Center

P.O. Box 769

Connell, Washington 99326

Respectfully signed
This Date: April 28, 2014

Robert J. Middleworth Jr.

Appendix B

1998 WL 325197
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois.

THERMOGEN, INC., an Illinois corporation, Plaintiff,
v.
Joany CHOU, Defendant.

No. 98 C 1230.
|
June 8, 1998.

MEMORANDUM OPINION AND ORDER

CONLON, District J.

***1** ThermoGen, Inc. ("**ThermoGen**") sued Dr. Joany **Chou** ("**Chou**") for a declaratory judgment pursuant to 28 U.S.C. § 2201. ThermoGen sought a declaration of title to equipment and supplies purchased with funds from a Federal Small Business Innovation ("SBIR") research grant awarded by the National Cancer Institute ("NCI"), a division of the National Institute of Health ("NIH"). In a memorandum opinion and order dated April 22, 1998 ("April 22 opinion"), this court found that applicable federal law vests legal title to the grant funded equipment and supplies in ThermoGen. Accordingly, the court ordered Chou to return the equipment and supplies to **ThermoGen**.

Chou's counterclaims are still pending. **Chou** counterclaims against **ThermoGen** for: (1) a declaration that she is entitled to the research grant as a third party beneficiary; (2) a declaration that she is entitled to use of the equipment and supplies as a third party beneficiary; (3) breach of contract; (4) a declaration that ThermoGen is not a grantee of the 1997 grant; and (5) fraud. [1] Am. Ans. & Countercl. ThermoGen moves to strike the first and second counterclaims as redundant pursuant to Fed.R.Civ.P. 12(f). ThermoGen separately moves to dismiss the first affirmative defense and third and fifth counterclaims pursuant to Fed.R.Civ.P. 12(b)(1) and (b)(6). [2]

BACKGROUND

The following facts are taken in part from the court's April 22 opinion. ThermoGen is an Illinois corporation engaged in the business of developing and marketing biotechnology products. ThermoGen's principal place of business is Chicago Technology Park, 2201 West Campbell Park Drive in Chicago. Chou is a resident of Chicago and former employee of **ThermoGen**. **Chou** is a distinguished research scientist who has spent more than 15 years investigating the herpes simplex virus.

In October 1996, Chou started working on a grant application for a research project involving novel therapeutic use of the herpes simplex virus system to treat human cancer. The application was submitted on December 13, 1996. The proposed research was based on Chou's prior work. Specifically, the project entailed genetic engineering of herpes virus DNA to incorporate specific genes that allow the virus to invade and destroy tumor cells. ThermoGen was included on the grant application as the "applicant organization." Chou was listed as the "principal investigator."

Chou became a **ThermoGen** employee in January 1997. On July 3, 1997, ThermoGen was awarded an SBIR grant of $100,000 by the NCI of the NIH. [3] In order to perform the grant work, **ThermoGen** provided **Chou** with valuable laboratory equipment

and supplies. ThermoGen purchased the equipment and supplies. Equipment and supplies purchased for grant work were reimbursed by the NIH following submission of disbursement requests by ThermoGen.

Chou resigned on January 5, 1998, prior to completion of work required by the grant. Following her resignation, Chou refused to return the equipment and supplies furnished by ThermoGen for her grant work. Consequently, ThermoGen filed the present declaratory judgment action, seeking a declaration of its title to the equipment and supplies based on applicable federal law.

***2** The parties agreed that the court's decision on ThermoGen's motion for a preliminary injunction would be a final decision on the merits of the declaratory judgment action. In the April 22 opinion, the court concluded that applicable federal law vests legal title to the grant funded equipment and supplies in ThermoGen. Accordingly, the court ordered Chou to relinquish possession of the grant funded equipment and supplies.

DISCUSSION

I. Motion to Dismiss Standards

In ruling on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the district court accepts as true all well-pleaded factual allegations, and draws reasonable inferences in favor of the plaintiff. *Ezekiel v. Michel,* 66 F.3d 894, 897 (7th Cir.1995). The district court may look beyond the jurisdictional allegations of the complaint and "view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co. v. F.D.I.C.,* 999 F.2d 188, 191 (7th Cir.1993) (per curiam); *Barnhart v. United States,* 884 F.2d 295, 296 (7th Cir.1989), cert. denied, 495 U.S. 957, 110 S.Ct. 2561, 109 L.Ed.2d 743 (1990). In responding to a motion that challenges the factual basis for jurisdiction, a plaintiff cannot simply rest on her pleadings. Rather, a plaintiff must set forth through affidavits or other evidence specific facts that establish jurisdiction. *Kontos v. United States Dept. of Labor,* 826 F.2d 573, 576 (7th Cir.1987).

II. Motion to Strike

ThermoGen moves to strike the first and second counterclaims pursuant to Fed.R.Civ.P. 12(f). ThermoGen's motion to strike is based on the assumption that the legal issues raised by the first and second counterclaims are necessarily joined with the merits of ThermoGen's motion for a declaratory judgment. In ThermoGen's view, the counterclaims are mooted by the decision on the merits of its underlying claims. As related in the background section, the court decided the merits of the motion for declaratory judgment via the procedural mechanism of ThermoGen's motion for a preliminary injunction. In the opinion, this court clearly stated that the substantive merits of Chou's counterclaims were not properly before the court at that juncture. Op. at 7. The court was not required to decide whether Chou is entitled to conduct the genetic research and to use the grant funded equipment and supplies as a third party beneficiary of the contract between the NCI and ThermoGen. Rather, it was only necessary to determine the merits of ThermoGen's declaratory judgment action. The court declared that applicable federal law vests rightful title to the grant funded equipment and supplies in ThermoGen. As the court did not reach the merits of **Chou's** first and second counterclaims, **ThermoGen's** motion to strike is denied.

III. Motion to Dismiss

ThermoGen moves to dismiss **Chou's** first affirmative defense, third and fifth counterclaims (collectively "the counterclaims") pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). ThermoGen first argues the court lacks supplemental jurisdiction over the counterclaims pursuant to 28 U.S.C. § 1367(a) because they do not arise from the same Article III case or controversy. Alternatively, ThermoGen argues the court should decline to exercise supplemental jurisdiction over the counterclaims because they substantially predominate over ThermoGen's narrow federal claim. § 1367(c)(2). ThermoGen's motion to dismiss for failure to state a claim is limited to the fifth counterclaim (fraud). ThermoGen contends the counterclaim does not allege fraud with particularity as required by Fed.R.Civ.P. 9(b).

***3** Initially, the court addresses the question whether the counterclaims form part of the same Article III case or controversy for purposes of supplemental jurisdiction. As part of the Judicial Improvements Act of 1990, Pub.L. No. 101–650, 104 Stat. 5089 (Dec. 1, 1990), Congress combined the doctrines of pendent and ancillary jurisdiction under the rubric "supplemental jurisdiction." The new statute provides that "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). With this statute, Congress intended to codify the doctrine of pendent jurisdiction. *See Salazar v. City of Chicago,* 940 F.2d 233, 243 n. 2 (7th Cir.1991). Because it is a codification of the old pendent jurisdiction doctrine, courts applying § 1367 have continued to rely on *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) in assessing whether a state law claim is "so related" to a federal claim as to constitute the same case or controversy under Article III of the United States Constitution.

Whether a given state claim is part of the same case or controversy for the purposes of Article III depends upon the various factors outlined by the Supreme Court in *United Mine Workers* and codified in § 1367. "[I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." *United Mine Workers,* 383 U.S. at 725, 86 S.Ct. at 1138. A court has the power to exercise pendent jurisdiction over plaintiff's state claims together with his federal claims if they derive from "a common nucleus of operative fact," *id.,* and commonly will exercise it if "considerations of judicial economy, convenience and fairness to litigants" weigh in favor of hearing the claims at the same time. *Id.,* 383 U.S. at 726, 86 S.Ct. at 1139.

Before Congress enacted 28 U.S.C. § 1367, the Seventh Circuit recognized a distinction between permissive and compulsory counterclaims with regard to supplemental jurisdiction: federal courts were deemed to have supplemental jurisdiction over compulsory counterclaims, but not over permissive counterclaims. *Rothman v. Emory University,* 123 F.3d 446, 454 (7th Cir.1997). The broad language of § 1367(a) erased the former distinction between compulsory and permissive counterclaims. Presently, the counterclaims need only be "so related to" the original claims that they form part of the same case or controversy under Article III. *Id.; see also Channell v. Citicorp Nat'l Servs., Inc.,* 89 F.3d 379, 385–87 (7th Cir.1996). In other words, counterclaims must derive from "a common nucleus of operative fact" with the original claims.

***4** There is a sufficient factual connection between the counterclaims and the original declaratory judgment claim to make them part of the same Article III case or controversy. The counterclaims all involve the same parties and the same subject matter —the NIH grant award. Furthermore, they derive from the same sequence of events: **ThermoGen** and **Chou's** completion of the NIH grant application; the alleged breach of an agreement to transfer the grant that led to Chou's resignation; and Chou's retention of the equipment and supplies. Accordingly, the court does not lack supplemental jurisdiction on this basis.

In the alternative, ThermoGen claims the court should decline to exercise jurisdiction because the counterclaims predominate over the declaratory judgment action within the court's original jurisdiction. § 1367(c)(2). This argument is essentially moot because the merits of ThermoGen's declaratory judgment action have already been decided. In other words, there is no longer a claim within the court's original jurisdiction over which the counterclaims can be said to predominate either in terms of proof or scope of remedies. Accordingly, § 1367(c)(2) is no longer a proper basis upon which to decline to exercise supplemental jurisdiction.

Nevertheless, this court may independently decline to exercise supplemental jurisdiction over counterclaims "in exceptional circumstances, [where] there are other compelling reasons for declining jurisdiction." § 1367(c)(4). There are compelling reasons to decline supplemental jurisdiction in this case. This declaratory judgment action was commenced to decide the narrow issue whether ThermoGen holds title to grant funded equipment and supplies pursuant to applicable federal law. The court resolved this narrow issue and the property unlawfully retained has been returned to **ThermoGen's** possession. While **Chou's** counterclaims derive from the same Article III case or controversy, they are state law claims without an independent basis for federal jurisdiction. Because ThermoGen's federal declaratory judgment claim has been resolved, the court declines to exercise supplemental jurisdiction over the remaining counterclaims. [4]

The court's decision to decline supplemental jurisdiction is in the interests of comity and fairness. The parties have yet to conduct any discovery on the counterclaims. In addition, the counterclaims consist of state law claims more appropriately adjudicated in state court. Accordingly, the court declines to exercise supplemental jurisdiction over Chou's amended counterclaims .[5]

CONCLUSION

ThermoGen's motion to strike the first and second counterclaims is denied. ThermoGen's motion to dismiss is granted in part. The court declines to exercise supplemental jurisdiction over the amended counterclaims pursuant to 28 U.S.C. § 1367(c)(4). Accordingly, the amended counterclaims are dismissed without prejudice.

All Citations

Not Reported in F.Supp., 1998 WL 325197

Footnotes

1 Shortly after filing the amended answer and counterclaims, Chou voluntarily dismissed the second affirmative defense and fourth counterclaim pursuant to Fed.R.Civ.P. 41(a)(1).

2 ThermoGen's motion to dismiss was filed on the same day Chou filed her amended answer and counterclaims. In the original answer and counterclaims, Chou's fraud claim is counterclaim four. The fraud claim was moved to counterclaim five in the amended answer and counterclaims. Accordingly, the court refers to the fraud claim by its revised number.

3 The Small Business Innovation Research Program is a federal grant program "under which a portion of a Federal agency's research or research and development effort is reserved for award to small business concerns." 15 U.S.C. § 638(e)(4).

4 This includes the first and second counterclaims that derive from a state law third party beneficiary contractual theory.

5 Because of this disposition, the court need not reach the merits of ThermoGen's 12(b)(6) motion to dismiss the fraud counterclaim.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 33018-4-III
v.	)	
	)	
ROBERT MIDDLEWORTH,	)	
	)	
Appellant.	)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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