United States Court of Federal Claims

No: 08-407 C
January 29, 2009

UNPUBLISHED

ALLEN J. KLEIN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Allen J. Klein, *pro se*.

Kent Christopher Kiffner, Court of Federal Claims Section, Civil Division, United States Department of Justice, for the defendant.

OPINION AND ORDER

Block, *Judge.*

On June 2, 2008, plaintiff filed his complaint in this court, alleging that the Federal Deposit Insurance Corporation ("FDIC") refused to recognize his valid claim for an insured deposit at the now-defunct TransOhio Savings Bank ("TransOhio"). Compl. 1–2. While plaintiff did not formally caption his complaint, it appears that plaintiff is attempting to recover $12,505.76 in principal and interest from the FDIC on the allegedly-insured account. *See* Compl. 1, 3 ("I am filing a lawsuit against the FDIC to recover my money."). In response, defendant submitted a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, pursuant to the RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS ("RCFC") 12(b)(1) and (6). Because, as discussed below, the court grants defendant's RCFC 12(b)(1) motion, the court does not reach the merits of defendant's RCFC 12(b)(6) motion.

As an initial matter, the court notes that plaintiff appears *pro se,* thus the court holds his pleadings to a less stringent standard than those drafted by an attorney. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007). Nevertheless, plaintiff retains the burden of establishing this court's jurisdiction by a preponderance

of the evidence. *See Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002) (citing *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942)); *Giles v. United States*, 72 Fed. Cl. 335, 336 (2006); *Tindle v. United States*, 56 Fed. Cl. 337, 341 (2003). In assessing defendant's motion to dismiss for lack of subject matter jurisdiction, the court accepts as true the complaint's undisputed factual allegations and construes the facts in a light most favorable to plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283 (1986); *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

The Tucker Act principally defines this court's subject matter jurisdiction and provides, in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). Section 2501 of title 28 further circumscribes this jurisdiction unless "[the] claim . . . is filed within six years after [the] claim first accrues." *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006), *aff'd* 128 S.Ct. 750 (2008) ("The six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims."); *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitation for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature.").

Absent a showing that the government concealed its acts or that plaintiff's injury was inherently unknowable, a claim accrues—and the statute of limitations begins to run—"when all events have occurred to fix the government's alleged liability, entitling plaintiff to demand payment and sue here for his money." *Martinez*, 333 F.3d at 1303, 1319 (citing *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985) and *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct.Cl. 1966)). The doctrine of equitable tolling[1] does not apply to section 2501 because of its jurisdictional nature. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753–54 (2008).

Plaintiff's allegations of fact are sparse and straightforward. Plaintiff claims that he deposited $4,958.65 in an FDIC-insured TransOhio retirement account on March 14, 1987, and

[1] "Equitable tolling" is a doctrine which provides that a statute of limitations does not run against a plaintiff who is unaware of his cause of action. *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1363 (Fed. Cir. 2008) (citing *Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir. 1985)); *see* BLACK'S LAW DICTIONARY 579 (8th ed. 2004) (defining equitable tolling as "the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired").

subsequently made no withdrawals as of the date of TransOhio's failure sometime in 1994.[2] Compl. 2, 5–8. Plaintiff asserts that he did not learn of TransOhio's failure until 2004, whereupon he submitted a claim to the FDIC. Pl.'s Mot. 2. The FDIC denied plaintiff's claim because the FDIC has not been able to find any record of plaintiff's account at the time TransOhio failed. Pl.'s Mot. 12–13. Now, fourteen years after TransOhio failed, plaintiff wishes to recover his insured funds[3] from the FDIC in this court. Compl. 1.

Plaintiff has not alleged that the defendant concealed its activities or that TransOhio's failure was inherently unknowable. Plaintiff merely alleges that "the FDIC did not notify [plaintiff] when the bank failed." Pl.'s Mot. 1. This certainly is not tantamount to an effort by the government to conceal its acts. Inexplicably, moreover, plaintiff has not explained why he failed to notice TransOhio's failure until 2004, during which time he also had a checking account at TransOhio and "lived . . . near some of [its] branches." Pl.'s Resp. 2.

Therefore, even accepting plaintiff's allegations of fact as true, plaintiff's claim accrued in 1994 when TransOhio failed and plaintiff could demand recovery of his insured deposit. *See* 12 U.S.C. §1821(f)(1) ("In the case of the liquidation of, or winding up of the affairs of, any insured depository institution, payment of the insured deposits in such institution shall be made by the [FDIC] as soon as possible . . . ."). Thus, this court lacks jurisdiction over plaintiff's claim because section 2501's six-year statute of limitations expired sometime in 2000, over eight years ago.[4]

Accordingly, defendant's motion to dismiss is **GRANTED**. The clerk is directed to dismiss the complaint without prejudice. Each side shall bear its own costs. **IT IS SO ORDERED.**

Lawrence J. Block
Judge

[2] Defendant believes that the actual date of TransOhio's failure was July 10, 1992, but concedes that the difference of two years does not affect the court's jurisdictional analysis. Def.'s Br. 2 n.2.

[3] Plaintiff asserts that the interest on his initial $4,958.65 deposit amounts to an additional $7,547.11, thus his total claim is for $12,505.76. Compl. 3–4.

[4] Defendant argues in the alternative that this court does not possess subject matter jurisdiction because the FDIC is not the United States and because the district courts possess exclusive jurisdiction to hear suits for disputed deposits. Def.'s Br. 4–6. The court declines to reach these issues in light of its holding above.