UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 13-2336 JRT/JJK

ADIJAT EDWARDS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Congress has been very deliberate in crafting exceptions to the FTCA's waiver of sovereign immunity, and the courts have been careful in construing those exceptions. In our initial memorandum we explained why the Complaint in this case falls within one or more of the FTCA's exceptions and jurisdiction is therefore lacking. Because Plaintiff's response fails to refute any of this, the Complaint remains subject to dismissal for the reasons previously set forth. Several points raised by Plaintiff are also addressed below.

I. Plaintiff Cannot Circumvent the Detention-of-Goods Exception by Characterizing Her Claim as "Conversion" or "Theft."

It is well established that, in determining whether an FTCA exception bars a claim, courts will look beyond a plaintiff's characterization of the claim "to ascertain the real cause of complaint." *United States v. Neustadt*, 366 U.S. 696, 703 (1961); *see also Johnson v. United States,* 547 F.2d 688, 691 (D.C.Cir.1976) (noting that the "label which a plaintiff applies to a pleading does not determine the cause of action which [she] states"). Accordingly, if in fact Plaintiff's claims "stem from" or "arise out of" the

detention of goods or property, they will be barred under 28 U.S.C. § 2680(c) and this Court lacks jurisdiction to hear them. *See United States v. Shearer*, 473 U.S. 52, 55 (1985) (FTCA exception bars "claims . . . that sound in negligence but stem from a battery committed by a Government employee"); *Kosak v. United States*, 465 U.S. 848, 854 (1984) (claims arising from the detention of goods or property must be dismissed). Simply put, courts do not allow plaintiffs to evade the FTCA's jurisdictional exceptions by means of artful pleading. *See Leleux v. United States*, 178 F.3d 750, 756 (5th Cir. 1999) (cited with approval by *Billingsley v. United States*, 251 F.3d 696, 698 (8th Cir. 2001)).

Plaintiff contends that "detention" within the meaning of the statutory exception at 28 U.S.C. § 2680(c) cannot include "the intentionally permanent deprivation of property." Memorandum in Opposition to Defendant's Motion to Dismiss (Doc. 22) (Mem. Opp.) at 5. However, although Plaintiff cites some decisions noting that "detention" *generally* refers to holding property temporarily, she fails to establish that this meaning is exclusive or necessarily precludes the permanent holding of property.[1] Otherwise stated, to say that temporary custody constitutes detention under Section

[1] The two decisions that seemingly come closest to supporting Plaintiff's position, *Kurinsky v. United States*, 33 F.3d 594 (6th Cir. 1994), and *Chapa v. United States Dep't of Justice*, 339 F.3d 388 (5th Cir. 2003), were both abrogated by the Supreme Court in *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, (2008) (listing these cases as among those in circuit split resolved by Court's ruling). While Plaintiff's suggestion (Mem. Opp. at 4) that the overruling was "on other grounds" is technically correct, the answer to the question at issue in *Ali* – whether the detention-of-goods exception applies to law enforcement activity outside the customs context – formed an important part of the lower courts' rationale in arriving at their definitions of "detention."

2680(c) is not to say that *only* temporary custody constitutes detention under Section 2680(c).

Indeed, courts have repeatedly concluded that the detention-of-goods exception applies even where an owner is permanently deprived of goods. *See, e.g., Formula One Motors, Ltd. v. United States*, 777 F.2d 822, 824 (2d Cir. 1985) ("Nothing in *Kosak* suggests that the Supreme Court . . . intended to precipitate a distinction between goods damaged and goods destroyed"; this very distinction was "advanced and rejected in *Kosak*"); *Olaniyi v. District of Columbia*, 763 F.Supp.2d 70, 89-90 (D. D.C. 2011) (applying detention-of-goods exception to claim for conversion of property); *Farmer v. Jacobsen*, 1998 WL 957237, *1 (D. Minn. Nov. 30, 1998) (Case No. 97-2562 (RHK/RLE)) (report & recommendation adopted Dec. 29, 1998) (applying detention-of-goods exception to complaint alleging that correctional officers "stole" and "misappropriated" inmate's property).[2] While the Eighth Circuit may not have directly addressed this question, it has cited with approval the Eleventh Circuit's decision in

[2] *See also, e.g., Chapa*, 339 F.3d at 390-91 (applying detention-of-goods exception to claim alleging permanent loss of property); *Cheney v. United States*, 972 F.2d 247, 248 (8th Cir. 1992) (applying exception where government seized plaintiff's car title, returned title to wrong person, and car was subsequently totaled); *Vallier v. United States*, 81 F.3d 155 (table), 1996 WL 101413, *1 (5th Cir. Feb. 27, 1996) (applying exception to claim that correctional officers lost one of inmate's tennis shoes); *Keil v. Spinella*, 2011 WL 43491, *5 (W.D. Mo. Jan. 6, 2011) *aff'd sub nom. Keil v. Triveline*, 661 F.3d 981 (8th Cir. 2011) (applying exception to conversion claim based on ICE agents' "retention" of plaintiff's two passports following investigation into his immigration status); *Butler v. United States*, 2009 WL 3028902, *4 (D. Minn. Sept. 17, 2009) (applying exception to inmate's claim that BOP employee "willfully and wrongfully deprived him of personal items"); *Lewis v. United States*, 2008 WL 4838722, *1 (D. Minn. Nov. 5, 2008) (applying exception to former inmate's claim that his property "was never sent to him after he was released" from BOP custody).

Schlaebitz v. United States Dep't of Justice, 924 F.2d 193, 194 (11th Cir. 1991) (per curiam), which applied the detention-of-goods exception to a conversion claim arising from an agency's improper release of plaintiff's personal property to a third party. *See Cheney v. United States*, 972 F.2d 247, 248 (8th Cir. 1992); *see also O'Ferrell v. United States*, 253 F.3d 1257, 1270 (11th Cir. 2001) (characterizing claims in *Schlaebitz* as sounding in "conversion," and confirming that 28 U.S.C. § 2680(c) bars such claims).

Plaintiff asks the Court to consider certain dictionary definitions, but overlooks the definition of other terms that are helpful to understanding the scope of Section 2680(c). For example, Plaintiff's brief (at 5) references *Goodman v. United States*, 987 F.2d 550 (8th Cir. 1993). The Eighth Circuit in that decision observed that the "concerns" that may have led Congress to enact the detention-of-goods exception "are equally valid whenever Customs *takes possession* of property." *Id.* at 551 (emphasis added). According to Black's Law Dictionary (6th ed. 1990), "possession" means "having control over a thing with the intent to have and to exercise such control" – a definition lacking any connotation of temporariness. Likewise, the Court in *Saint-Surin v. United States*, 2012 WL 5439141, *1 (D. Minn. Oct. 22, 2012), applied the detention-of-goods exception to a claim that a prison employee "wrongfully confiscated" certain property. Looking again to Black's, the definition of "confiscate" – "to appropriate property to the use of the government" – bears no connotation of temporariness.

Therefore, the detention-of-goods exception applies to Plaintiff's claim for "theft" or "conversion," and the claim should be dismissed for lack of jurisdiction.

II. A Claim For Negligent Supervision Is Unavailable to Plaintiff.

Citing no authority, Plaintiff asserts in her memorandum (at 7) that she has met the FTCA's strict exhaustion requirement "[b]ecause the same facts giving rise to the negligence cause of action were raised in the administrative claim to the agency." The statutory language makes clear, however, that an "action shall not be instituted upon a *claim* against the United States . . . unless the claimant shall have first presented the *claim* to the appropriate Federal agency and [her] *claim* shall have been finally denied by the agency." 28 U.S.C. § 2675(a) (emphases added). Congress has thus stated that the agency must have an opportunity to evaluate and respond to a plaintiff's "claim," not simply the underlying facts at issue. This makes good sense: allowing plaintiffs to change legal theories following a denial by the agency would encourage the filing of frivolous administrative claims simply to ensure a hearing in federal court. Accordingly, Plaintiff's failure to present her negligent-supervision claim to ICE is enough to conclude that the Court lacks jurisdiction to entertain it. *See Porter v. Fox*, 99 F.3d 271, 274 (8th Cir. 1996).

In any event, Plaintiff's effort to show that the FTCA's discretionary-function exception would not apply to bar her negligent-supervision claim is equally unavailing. This exception, found at 28 U.S.C. § 2680(a), applies to decisions that "involve[] an element of judgment or choice," as opposed to those that are "controlled by mandatory statutes or regulations." *Herden v. United States*, 726 F.3d 1042, 1046 (8th Cir. 2013) (quoting *United States v. Gaubert*, 499 U.S. 315, 328 (1991)) (internal quotation marks

omitted). The exception applies broadly "as long as a discretionary decision is *susceptible to policy analysis*, . . . whether or not a defendant in fact engaged in conscious policy-balancing." *Id.* at 1047 (emphasis added; internal quotations and citation omitted). Indeed, the Supreme Court has expressly stated that "[d]iscretionary conduct is *not confined* to the policy or planning level." *Gaubert*, 499 U.S. at 325 (emphasis added).

Plaintiff's only real argument here is an attempted analogy, based on *Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986), supposedly to show that the discretionary-function exception cannot apply "because law proscribes government agents, and everyone else, from stealing." Mem. Opp. at 8. *Aslakson* was decided prior to pivotal Supreme Court discretionary-function decisions such as *Gaubert* and *Berkovitz v. United States*, 486 U.S. 531, 536 (1988), and makes no mention of training or supervision. It is therefore difficult to see how *Aslakson* is relevant to this case.

Moreover, Plaintiff's contentions in this regard bring her into conflict with yet another well-established principle of law that underscores the Court's lack of jurisdiction over the negligent-supervision claim. Specifically, Plaintiff's memorandum emphasizes that her allegations are directed to ICE's supposed "[f]ail[ure] to train or supervise agents to the extent necessary to keep them from committing crimes against the people in their custody," and to the agency's policies (or lack thereof) "preventing agents from stealing the property of deportees." Mem. Opp. at 9.[3] This articulation of the negligent

[3] These statements are consistent with the articulation of Plaintiff's negligent supervision

supervision count shows that the *gravamen* of the claim is to hold the government liable for the same actions complained of in Plaintiff's "conversion" claim, as well as ICE's training of (or failure to train) the agents who engaged in the alleged conduct within the scope of their employment. As such, the claim – unlike the one allowed to proceed in *Billingsley v. United States*, 251 F.3d 696, 698 (8th Cir. 2001) – runs afoul of the rule of *Sheridan v. United States*, 487 U.S. 392, 403 (1988), that negligent supervision claims that amount to attempts to circumvent an otherwise-applicable FTCA exclusion are impermissible. *See also Leleux v. United States*, 178 F.3d 750, 757 (5th Cir. 1999) (decision endorsed by 8th Circuit in *Billingsley*, holding that a negligent-supervision claim will be barred by otherwise-applicable FTCA exclusion unless duty allegedly breached does *not* arise from the employment relationship). Accordingly, to the extent that Plaintiff's conversion claim is barred by the detention-of-goods exception, her negligent-supervision claim – assuming the Court even reaches the issue – should be likewise barred for this additional reason.

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claim in her Complaint, which alleges that ICE "owed a duty to Plaintiff to protect, safeguard, and return property taken from Plaintiff" and that the "actions of ICE as an agency and its individual officers" constitute a breach of that duty. Complaint ¶¶ 30-31.

CONCLUSION

For the foregoing reasons, and those stated in our initial memorandum, the United States respectfully requests that the Court dismiss Plaintiff's Complaint in its entirety for lack of jurisdiction.

Dated: April 14, 2014

Respectfully submitted,

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