2015-5100

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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ANTHONY PISZEL,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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Appeal from the United States Court of Federal Claims
in No. 14-CV-00691, Judge Lydia Kay Griggsby

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# SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE, THE UNITED STATES

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Pursuant to the Court's April 7, 2016 order, defendant-appellee, the United States, respectfully submits this supplemental brief.

## ARGUMENT

1. **Does the fact that HERA's golden parachute provision, 12 U.S.C. § 4518(e), did not eliminate breach of contract claims preclude a takings action against the government?**

Yes. Although, as part of its oversight responsibilities, FHFA was expressly authorized to "prohibit or limit, by regulation or order, any golden parachute

payment" that would be made by Freddie Mac, 12 U.S.C. § 4518(e), the enactment of HERA's golden parachute provision did *not* bar an executive from asserting a breach of contract claim against Freddie Mac. That fact precludes Mr. Piszel's takings claim against the United States.

In analyzing a takings claim, the first question is always "what was taken." *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995). Here, the property rights for which Mr. Piszel seeks compensation are those "to which he was [allegedly] contractually entitled under [his] employment agreement." Appx. 36. Where a plaintiff retains a contract-based claim, his "expectations with regard to [his] property interest have not been contravened and the value of those interests ha[s] not been diminished." *Castle v. United States*, 48 Fed. Cl. 187, 218 (Fed. Cl. 2000), *aff'd in relevant part, rev'd in part,* 301 F.3d 1328 (Fed. Cir. 2002); *see also A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014) (holding that a viable takings claim does not exist where no economic impact is shown). This is because, at its core, a contract conveys nothing more than "a right to the payment of damages in the event of nonperformance," and, therefore, "no taking can occur as long as such a right exists." *ConocoPhillips v. United States*, 73 Fed. Cl. 46, 55 (2006), *aff'd*, 501 F.3d 1374 (Fed. Cir. 2007); *see also FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002) (citing Oliver Wendell Holmes, Jr., *The Common Law* 300-02 (1881); Holmes, "The Path of the

Law," 10 Harv. L. Rev. 457, 462 (1897)). In other words, a party "to whom a contract remedy is available . . . has not been deprived of the rights conferred on him by contract" and a claim for the taking of such contract rights "therefore must fail."[1] *ConocoPhillips*, 73 Fed. Cl. at 55; *see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985) (holding that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to" obtain compensation through available procedures).

Applying these principles here, Mr. Piszel cannot state a takings claim against the Government because Mr. Piszel could have sought a contract remedy from Freddie Mac – a remedy that he ultimately allowed to lapse, *see* Va. Code Ann. § 8.01-243(B) (2016) (providing a five year statute of limitations for breach

[1] The same conclusion has been reached in other cases. *See Castle*, 48 Fed. Cl. at 218 ("Because the present plaintiffs have available . . . contract-based claims, plaintiffs' expectations with regard to their property interests have not been contravened and the value of those interests [has] not been diminished. Accordingly, we are unable to conclude that plaintiffs have suffered a taking."); *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 152 (2002) (dismissing taking claim and explaining that "[t]he property rights allegedly taken were the contractual rights themselves, not a separately existing property interest," and because the scope of those rights was "identical to the scope of the contract, and [plaintiff's] remedy is an action for breach of contract."); *Ace Property & Cas. Ins. Co. v. United States*, 60 Fed. Cl. 175, 182 & n.7 (2004) (concluding that a breach of contract claim must be brought against the counterparty to the contract and noting that "[a] takings claim is inappropriate where it duplicates a breach of contract claim and a breach of contract remedy is available to the plaintiff").

of contract claims); *Dunlap v. Cottman Transmission Sys., LLC*, 754 S.E.2d 313, 320 (Va. 2014) (same).[2]

In proceedings below, Mr. Piszel never argued that his contract remedies as to Freddie Mac did not remain intact, but instead asserted that "only when the Government itself is a party to the contract with the plaintiff, such that the plaintiff can sue the Government directly for the Government's breach of contract," does an available contract remedy foreclose a taking. *See* Appx. 115-17. Mr. Piszel failed to offer any persuasive rationale or authority to support this purported limitation, because there is none. No matter who the contract remedy is retained against – another private party or the Government – a plaintiff whose remedy remains has not lost his property interest in the contract.

Indeed, this Court foreclosed Mr. Piszel's proffered limitation in *767 Third Avenue Associates v. United States*, 48 F.3d 1575 (Fed. Cir. 1995). There, a plaintiff-landlord contracted with foreign organizations for the rental of offices in New York. When the Government froze the organizations' assets, they defaulted on their leases. The plaintiff sued for a taking, claiming the Government caused

[2] The substantive law governing the contract between these two private parties, Mr. Piszel and Freddie Mac, is that of the Commonwealth of Virginia.

the default, thereby depriving the plaintiff of the benefits of its contract. *See id.* at 1577. This Court rejected the claim, reasoning that:

> [T]he leases specifically provided damages remedies that [plaintiff] *could have attempted to enforce* in its district court suit [but did not]. The government's actions in this case thus did not take [plaintiff's] interests in the leases.

*Id.* at 1582-83 (emphasis added). Mr. Piszel's situation is no different: he "could have attempted to enforce" his contract rights directly, but chose not to; as in *767 Third Avenue Associates*, therefore, the Government "did not take" his property.

**2. Would recovery for such a breach of contract claim be limited by the doctrine of impossibility or the sovereign acts doctrine and would limitations for breach of contract claims in HERA, 12 U.S.C. § 4617(d)(3)(A), preclude or limit recovery of breach of contract damages from Freddie Mac?**

Any defense, such as impossibility, that would generally apply in breach of contract suits between private parties would have potentially been available to Freddie Mac in a breach of contract action by Mr. Piszel. However, because Mr. Piszel opted not to bring a contract action within the limitations period, whether an impossibility defense would have *actually* limited his available recovery is unknown and unknowable. The sovereign acts doctrine, which applies only in breach actions against the sovereign, *i.e.*, against the United States, would not limit Mr. Piszel's potential recovery of damages against Freddie Mac for breach of contract. In addition, 12 U.S.C. § 4617(d)(3)(A), which applies only

where a contract is repudiated by Freddie Mac's *conservator*, likewise would not limit Mr. Piszel's potential recovery of breach damages.

**a. The Impossibility and Sovereign Acts Defenses**

Mr. Piszel's recovery of breach of contract damages would be subject to affirmative defenses available under applicable law, if those defenses were asserted and proved by Freddie Mac. This would include the defense of impossibility, which the Commonwealth of Virginia has long recognized. *See Hampton Roads Bankshares, Inc. v. Harvard*, 781 S.E.2d 172, 177-78 (Va. 2016); *Housing Auth. v. E. Tenn. Light & Power Co.*, 31 S.E.2d 273, 276 (Va. 1944).

The sovereign acts doctrine however, would be unavailable as a matter of law in a breach action by Mr. Piszel against Freddie Mac. "Under the sovereign acts doctrine, *the United States, when sued as a contractor*, cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as sovereign."[3] *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1345 n.2 (Fed. Cir. 2013) (emphasis added; internal quotation marks and citations omitted); *see also Klamath Irr. Dist. v. United States*, 635 F.3d

[3] Implicit in the very recognition of this defense is that the Government is *not* liable for a taking whenever a "public and general" act renders contract performance impossible. If that were not the case, the doctrine would serve no purpose whatsoever – with takings liability being an automatic substitute for contract liability.

505, 521 (Fed. Cir. 2011). The sovereign acts defense is thus available only to the sovereign, *i.e.*, to the United States itself. *See id.* It is has no role in lawsuits between private parties, such as an action by Mr. Piszel against Freddie Mac.

The question remains whether a breach of contract claim, if brought by Mr. Piszel, would have actually been limited by affirmative defenses that Freddie Mac could have chosen to raise. This would depend, in part, on how the breach action was litigated and is therefore inherently unknowable. More fundamentally, however, it is not the role of the Court of Federal Claims to resolve a dispute between private parties – a dispute that was not brought in a court of competent jurisdiction and that is now time-barred. *See* 28 U.S.C. § 1491. Where, as here, a dispute between "private parties" presents a "prerequisite to any recovery [against] the Government," the Court of Federal Claims lacks jurisdiction to resolve it, and cannot properly decide it to create a predicate for a claim against the Government. *United States v. Sherwood*, 312 U.S. 584, 588 (1941); *accord McPherson v. United States*, 2 Cl. Ct. 670, 673 (1983) (citing *Sherwood* in dismissing claim against the Postal Service where resolution of employee's grievance with a union was a prerequisite for relief).

By definition, if Mr. Piszel could have sued for breach with respect to the contract rights he claims were taken, then nothing was taken, and the Government cannot be liable. The underlying contract dispute is between "private parties,"

which the Court of Federal Claims, under *Sherwood*, cannot entertain and resolve. Accordingly, for this additional reason, Mr. Piszel's takings claim fails and the decision below should be affirmed.

**b. Limitations in HERA**

HERA, like the Safety and Soundness Act before it, authorized FHFA to place Freddie Mac into conservatorship. One aspect of a conservator's authority was the power to "disaffirm or repudiate any contract" to which Freddie Mac was a party. 12 U.S.C. § 4617(d)(1). In the event of a disaffirmance or repudiation, HERA limited the conservator's liability "to actual direct compensatory damages." 12 U.S.C. § 4617(d)(3)(A); *see also* 12 U.S.C. § 4617(d)(3)(B) (barring "punitive or exemplary damages," "damages for lost profits," and "damages for pain or suffering").

The limitation on *the conservator's* liability in 12 U.S.C. § 4617(d)(3)(A) is inapposite. This action concerns actions allegedly taken by FHFA as Freddie Mac's regulator – not as its conservator.[4] *See* Applnt. Br. 38 n.10 ("[T]he Government was *not* acting as conservator when it [allegedly] took Mr. Piszel's

[4] A repudiation claim against FHFA in its capacity as conservator could not be entertained by the Court of Federal Claims. *See, e.g., O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) ("[T]he FDIC *is not the United States* when it acts . . . as receiver for a failed bank.") (emphasis added). The capacity in which FHFA acted, however, has no bearing on Mr. Piszel's ability to assert a breach of contract claim against Freddie Mac in state or district court.

property; it was acting as Freddie Mac's regulator.") (emphasis in original); Appx. 35 ("Mr. Lockhart, acting in his capacity and under his authority as the FHFA's Director of the FHFA and Freddie Mac's regulator . . . ."); *id.* at 39 ("FHFA's actions, taken by Mr. Lockhart in his capacity and under his authority as the FHFA's Director and Freddie Mac's regulator . . . ."); *id.* 35, 36 (alleging that Mr. Piszel was terminated without the "benefits to which he was contractually entitled" "as a result of [a] 'directive'" from FHFA's Director "under his authority as . . . Freddie Mac's regulator"). As a result, section 4617 is inapplicable and would not affect Mr. Piszel's recovery in a breach of contract action.[5]

**3. If these doctrines or statutory provisions would limit recovery, what impact would that have on the existence of a takings claim?**

Whether Mr. Piszel's once-potential-but-now-lapsed contract claim could ever ultimately have succeeded has no bearing on the analysis of his takings claim. Mr. Piszel retained a right to seek damages for breach against his contracting partner in accordance with Virginia law, and well-recognized defenses that Freddie Mac might have raised if a breach action had been pursued in state or district court,

[5] The Court noted a conflict in the courts of appeal construing a provision analogous to section 4617, which applies where a bank is placed into receivership by the Federal Deposit Insurance Corporation (FDIC). *See* Order at 2 (Apr. 7, 2016) (citing *Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 27 F.3d 598 (D.C. Cir. 1994), and *Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993)). Here, because section 4617 is inapplicable, it is unnecessary to determine the meaning of the phrase "actual direct compensatory damages" in that section.

such as frustration or impossibility, were the background principles against which Mr. Piszel contracted. *See Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005) ("[T]he Constitution does not itself create or define the scope of 'property' interests protected by the Fifth Amendment. Instead, 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking.") (citing *Maritrans v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)); *see also Bailey v. United States*, 53 Fed. Cl. 251, 257 (2002) (explaining that "while the [contract] remedy did not produce any recovery for the Shareholder plaintiffs, they were never deprived of their property interest in a contractual remedy"), *aff'd*, 341 F.3d 1342 (Fed. Cir. 2003).

Consequently, Mr. Piszel cannot plausibly assert that application of the well-established defense of impossibility in a state or district court breach action – or any other recognized contract law doctrine – would operate to deprive him of contract rights. Mr. Piszel's employment contract was at all times subject to such legal doctrines and, therefore, nothing could be taken from him if such legal principles limited or barred his recovery from Freddie Mac.

## CONCLUSION

For these reasons, and the reasons given in our principal brief, the United States respectfully requests that judgment below be affirmed.

Respectfully submitted,

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April 29, 2016

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on the 29th day of April, 2016, a copy of the foregoing "SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE, THE UNITED STATES" was filed electronically.

X This filing was served electronically to all parties by operation of the Court's electronic filing system.

s/ David A. Harrington

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