

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)
)
 Plaintiff,)
)
 v.) Civil Action No. 75-1996
)
 UNITED STATES DEPARTMENT)
 OF JUSTICE,)
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 Defendant.)
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DEFENDANT'S RESPONSE TO PLAINTIFF'S REPLY TO
DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR
PARTIAL RECONSIDERATION OF COURT'S ORDER ENTERED
JANUARY 21, 1983 AND ATTACHED DECLARATION AND
EXHIBITS

INTRODUCTION

Pursuant to this Court's telephonic request of March 8, 1983, defendant is filing this pleading in order to respond to plaintiff's reply to defendant's opposition to plaintiff's motion for partial reconsideration of this Court's Order of January 21, 1983. Plaintiff has selected self-serving documents and exhibits to support his claims concerning the alleged consultancy agreement between plaintiff and defendant while ignoring sworn testimony and other evidence already in the record which disprove his assertions. Furthermore, not only are some of plaintiff's exhibits irrelevant to the resolution of the issue before this Court, but several of his exhibits contain information which clearly supports this Court's decision and defendant's contention that no legally enforceable agreement ever existed between the

parties in this action. Consequently, this Court should deny plaintiff's motion for partial reconsideration of its Order entered on January 21, 1983.

FACTS

Before addressing the specific allegations made by plaintiff in his reply, defendant briefly supplements the facts relevant to the existence vel non of the consultancy agreement. The Court is respectfully referred to defendant's memorandum of points and authorities in opposition to plaintiff's motion for partial reconsideration of Court's Order entered January 21, 1983 for a full discussion of the facts underlying the question of the alleged consultancy agreement.

Plaintiff's rendition of the facts relevant to this case conveniently ignores the depositions that plaintiff's counsel took of Mrs. Lynne Zusman on July 7, 1982 and of Mr. Daniel Metcalfe on May 27, 1982, and July 13, 1982. These depositions seriously undermine plaintiff's claim that defendant, specifically Mrs. Zusman, entered into any consultancy contract with him. Mrs. Zusman's testimony is clear and unambiguous. Speaking directly to Mr. Weisberg's attorney, James H. Lesar, through whom Weisberg claims the offer of \$75 an hour as a consultancy fee was made, Mrs. Zusman stated in her deposition that:

. . . I did not make you an offer, I did not represent that the Justice Department would make an offer at that rate, and I am willing to go into court and testify before the Judge about it.

Zusman Dep., p. 17. When Mr. Lesar asked Mrs. Zusman during the deposition whether she had ever mentioned the figure of \$75.00 in the course of the January 15, 1978 telephone conversation, she explained that she mentioned the figure but not as an offer to Mr. Weisberg. She said:

I believe that I said that the only instance that I had ever heard of [regarding hiring a consultant], which was highly unusual, was this instance involving Mort Halperin and that the figure that had been discussed [in the Halperin case] was like that [\$75.00/hour], but that it had never been followed through on and that there were vast differences in what was involved in the two cases, and in the background of the two individuals involved.

Zusman Dep., p. 17. Mrs. Zusman was clear that she never even believed that she had the legal ability to contract with Mr. Weisberg on behalf of the Government. She said:

. . . I don't believe that I ever felt that I had the authority to offer any rate because I had absolutely no experience with consultancies . . . I would never have taken it upon myself to offer a rate.

Zusman Dep., p. 63.

In the course of her deposition, Mrs. Zusman was shown a letter from Mr. Lesar to former Deputy Assistant Attorney General (DAAG) William Schaffer which stated "[o]n January 15, 1978, Mrs Zusman called me to offer a rate of payment of \$75.00 per hour, and Mr. Weisberg has accepted this." Declaration of James H. Lesar attached to Plaintiff's Reply ("Lesar Declaration"), Exhibit 18; Zusman Dep., p. 75. Again

Mrs. Zusman was straightforward in her reaction to the letter. She said, "I dispute that fact," Zusman Dep., p. 75, and then "[t]he statement in the letter is outrageous." Zusman Dep., p. 77.

Mrs. Zusman's position that no contract existed with Mr. Weisberg was also never in doubt. She explained:

There was no agreement entered into because as I've already enumerated[,] at least three, if not more, major elements for mutual commitment. . . were lacking; the approximately [sic] number of hours for which Mr. Weisberg could reasonably expect to be compensated, the rate at which compensation was to take place, and thirdly an agreement on what the product was.

Zusman Dep., p. 72. See also pp. 24,25,33-4,47,60,62,68, and 86.

As to her own view of why a controversy arose over the consultancy, Mrs. Zusman was similarly outspoken:

I think that you [Weisberg and Lesar] had both been very manipulative in this whole thing, and I think that it was clear that you tried to capitalize on a spirited proposal by Mr. Schaffer, which never was accepted by you or your client.

Zusman Dep., p. 71. See Lesar Declaration, Exhibits 2 and 3, for further evidence that plaintiff never unconditionally accepted Mr. Schaffer's proposal.

Plaintiff implies that his letters dated December 11, 1977, and December 17, 1977, indicate that he thought there was a contract and that he was working on such a contract, Lesar Declaration, Exhibits 8 and 9, and that defendant's failure to respond to those letters gives plaintiff an entitlement to a

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contractual award. Mrs. Zusman's deposition testimony, however, dealt with these asserted implications.

Mrs. Zusman had several things to say about those letters. She explained that, "Harold Weisberg was one of the [FOIA] requestors who was evidently not able to meaningfully communicate what it was that he was arguing over." Zusman Dep., p. 35. The fact that Mr. Weisberg may have stated his misapprehensions as to the existence of a contract somewhere in letters to a high Justice Department official was, thus, not determinative. Mrs. Zusman knew well of Mr. Weisberg's mammoth correspondence with the Justice Department, his many disagreements with the Government over the years, and had concluded that:

I have no idea of what your client's understanding of reality was, either as it pertains to the facts concerning this matter at litigation, or anything else.

Zusman Dep., p. 51.

Mr. Weisberg's letters of December 11 and 17, 1977, were, in Mrs. Zusman's opinion, simply unreadable. Regarding the December 11, 1977 letter, Mrs. Zusman explained:

. . . [O]ne would have to sit down and spend a considerable amount of time outlining what it is that your client says in this letter. He raises a very large number of issues and it's in a very disorganized and confusing fashion.

Zusman Dep., p. 37. As to the December 17 letter, Mrs. Zusman explained that besides being difficult to read, the letter indicated that the writer was not interested in constructively working on any project with the Department of Justice. Zusman

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Dep., p. 47. When a letter from Mr. Weisberg's counsel was finally sent to Mrs. Zusman on March 28, 1978, Lesar Declaration, Exhibit 22, claiming in clear language that Mrs. Zusman had made a specific offer to Mr. Weisberg, it was promptly answered. Lesar Declaration, Exhibit 22A. The response by Mrs. Zusman was, of course, to deny the existence of any such offer.*/

The Metcalfe depositions do not dispute Mrs. Zusman on any significant point. Mr. Metcalfe recalled that he knew that Mr. Weisberg had taken the position that he had an "arrangement" or "commitment" of some kind with the Department of Justice and "it was my view, or my understanding, that that position was not necessarily well taken." Metcalfe May 27, 1982 Dep., p. 23. His best recollection was that, although he could recall no specific discussions with Mrs. Zusman, he communicated his doubts about the

Why should I have any idea who was who?

*/ It is interesting to note that, although plaintiff's counsel claims that Mrs. Zusman made the \$75 an hour offer on January 15, 1978, that specific amount is not mentioned in any of plaintiff's exhibits until Mr. Lesar's letter to Mr. Schaffer dated January 31, 1978. Lesar Declaration, Exhibit 18. Specifically, no mention of that amount appears in Mr. Weisberg's letter to Mrs. Zusman dated January 18, 1978, in the handwritten notes from the January 26, 1978, meeting between government representatives and Mr. Lesar, or in Mr. Metcalfe's summary of the January 26, 1978, meeting. Lesar Declaration, Exhibits 14, 15, and 16 respectively. Although Mr. Weisberg's letter to Mrs. Zusman dated January 27, 1978 contains a cryptic reference to her telling Mr. Lesar verbally what the rate of pay would be, he does not mention the specific \$75 amount. Lesar Declaration, Exhibit 17.

In addition, despite plaintiff's assertions to the contrary, defendant responded immediately once it became aware of Mr. Lesar's misconception that the Department had offered to pay Mr. Weisberg \$75 an hour. See Lesar Declaration, Exhibits 19, 20 and 21.

The truth is that after these depositions kept stalling the case on the ground that they had not received my original financial report - until they were set around either on it or they did use to produce it.

accuracy of Mr. Weisberg's position to her. Metcalfe May 27, 1982 Dep., p. 24. It was also his understanding that the rate of payment in the proposed consultancy arrangement "was not even close to being resolved to the mutual satisfaction of the parties involved." Metcalfe July 13, 1982 Dep., p. 29.

Plaintiff has included as an exhibit to his reply notes prepared at the time by Mr. Metcalfe. Lesar Declaration, Exhibit 16. The inclusion of these notes is meant to imply that Mr. Metcalfe was aware of the existence of a contract. This is simply not true as Mr. Metcalfe so explained in his July 13, 1982 deposition. See Metcalfe Dep., pp. 14-17, 28-29. As Mr. Metcalfe said:

. . . [T]here certainly was an intent on part of the Department of Justice officials involved to pay Mr. Weisberg for such work, if the rate of payment, and any other necessary consideration involved could be resolved to the mutual satisfaction of the parties.

It was my understanding that there was at least one such necessary element of that "Arrangement" that-- specifically the rate of payment, that at that time had not been resolved, was not even close to being resolved to the mutual satisfaction of the parties involved.

Metcalfe July 13, 1982 Dep., p. 29.

In conclusion, Mr. Weisberg was informed in writing on April 7, 1978, of the Department's position that no contract had ever been formed. Lesar Declaration, Exhibit 22A. This point was made again in the Zusman affidavit filed on May 21, 1978, and at hearings on May 17, 1978, May 24, 1978, and June 26, 1978. It was in the June hearing that this Court referred to the "consultancy

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agreement" as having fallen apart. Two weeks later, plaintiff submitted his "work product" to the Department of Justice along with his bill for services. The bill was immediately returned unpaid to plaintiff's counsel. *But not the report*

ARGUMENT

I. This Court Correctly Decided The Factual Issues In Defendant's Favor.

In his reply, plaintiff initially discusses four factual issues which he contends should have been decided in his favor. He attempts to support these contentions by attaching numerous exhibits to his reply. It is the defendant's position that these questions were correctly decided by the Court and that plaintiff's exhibits do not prove otherwise.

A. The Amount of Time to be Spent on The Consultancy Was Never Agreed Upon.

Plaintiff asserts that if the Department wanted to place a time limit on the amount of time he was to spend on the consultancy, it was the Department's obligation to do so. Plaintiff's Reply, p. 4. This is clearly incorrect. Plaintiff cannot validly assert that under a "contract" he could work for as long as he wanted. Both parties need to agree to the duration of a contract. Under basic principles of contract law, there must be an agreement, a "meeting of the minds," before an enforceable contract exists. See 1 A. Corbin, Contracts § 107 (1950 and Supp. 1982). Defendant never consented to plaintiff's spending an unlimited number of hours on the alleged consultancy.

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As this Court noted, "[t]he amount of time to be spent was crucial because the total cost to the defendant would depend primarily on it." Memorandum Opinion, January 20, 1983, p. 25. Plaintiff also had an interest in determining the amount of time he was to spend on the consultancy since he did not want to do the work and would rather have spent the time doing his own work. See Lesar Declaration, Exhibits 7, 9, 13, 20. Defendant and plaintiff never agreed on the amount of time to be spent. Since this would have been an essential term of any consultancy agreement, no contract was created. "Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement" prevent the formation of an enforceable contract. 1 A. Corbin, Contracts §95 (1950 & Supp. 1982). See also Restatement (Second) of Contracts, §33; Memorandum Opinion, January 20, 1983, p. 25.

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B. Defendant Did Not Receive Any Benefit From Plaintiff's Work.

Plaintiff contends that his work benefitted defendant because he sent copies of his consultancy reports to Mr. Quinlan J. Shea and because Mr. Shea acknowledged receiving and reviewing the reports. Lesar Declaration, Exhibits 24, 25, 26. However, plaintiff himself has admitted in a previous affidavit that defendant Civil Division and FBI did not use his report. See Weisberg Affidavit filed August 23, 1982, ¶18 ("After I provided my consultancy report, neither the Civil Division nor the FBI ever addressed it. . . .") and ¶80 ("... while simultaneously they [the

This is not what she did and he did. What he did was to get my

using any attorney he met. The same. My husband agreed to do it, to FBI records state. Check my work for 2 months in FBI records

Because they did not comply with the requirements of the Civil Division] ignore my consultancy report and its specifications of noncompliance").

Defendant wanted the consultancy arrangement to produce a detailed nonnarrative list of the specific deletions plaintiff took issue with. Affidavit of Lynne K. Zusman attached to Report to the Court, May 12, 1978, p. 1. See also Lesar Declaration, Exhibits 22A and 23. Plaintiff, however, prepared narrative reports which he submitted two weeks after this Court acknowledged that the consultancy had fallen apart, see Hearing Transcript, June 26, 1978, p. 7, and defendant's counsel had agreed. Id. at p. 9. Plaintiff and his counsel, nevertheless, ignored these clear indications that no agreement had ever been reached. Since defendant did not even receive the work product it had wanted and, in addition, ^{she did} did not make use of the "report" it received, it is clear that defendant did not receive a benefit from plaintiff's work.

C. Further Terms Needed to be Agreed to Before Plaintiff Proceeded With The Consultancy Work.

This Court was correct in finding that plaintiff should reasonably have realized that further terms needed to be agreed upon before proceeding with the work. Memorandum Opinion, January 20, 1983, p. 25-26. Not only did the amount of time involved in the consultancy need to be worked out, but also the fee to be paid plaintiff for his work was never agreed upon. See Facts, supra, and Defendant's Opposition to Plaintiff's Motion for Partial

Because they did not comply with the requirements of the Civil Division] ignore my consultancy report and its specifications of noncompliance").

no way it would be of any use

Reconsideration of Court's Order Entered January 21, 1983.

In addition, plaintiff's own exhibits reveal other terms upon which agreement was never reached. From the earliest discussion of the consultancy it was clear that there were misunderstandings as to what plaintiff was to do. As discussed above, defendant wanted a nonnarrative list of the deletions plaintiff was contesting. Lesar Declaration, Exhibits 22A and 23. Plaintiff recognized that his work product was to be a list. Lesar Declaration, Exhibits 3 and 5, p. 2. The purpose of the consultancy was to facilitate the recognition of the issues remaining to be resolved in the lawsuit. Lesar Declaration, Exhibit 2. Plaintiff himself recognized that there were limitations as to what could be expected of him under the arrangement. See Lesar Declaration, Exhibit 5. Plaintiff's counsel also admitted that the defendant might have some "false expectations" as to what the consultancy arrangement would produce. See, e.g., Lesar Declaration, Exhibits 15 & 16. In short, there was a basic misunderstanding as to what was meant by the term "consultant." Defendant simply wanted plaintiff to specify what deletions he took issue with as he was required to do by an earlier stipulation, see Lesar Declaration, Exhibit 2, while plaintiff had a more expansive idea that included giving advice and comments as the Department's "consultant." See e.g., Lesar Declaration, Exhibit 9, p. 2.

Based on these few examples, it is clear that plaintiff should reasonably have realized that there were further essential

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terms which needed to be agreed upon before proceeding with the consultancy. In fact, plaintiff's letter of December 17, 1977 in which he insisted on a written contract presents uncontested evidence that plaintiff knew that there was a need for further terms to be agreed upon. See Lesar Declaration, Exhibit 9. Plaintiff's counsel also admitted that there was no contract until the amount of the fee could be worked out. See Lesar Declaration, Exhibit 20. As discussed extensively in earlier memoranda, no fee was ever agreed upon. Clearly, this Court was correct in holding that no enforceable contract existed.*/

II. Estoppel Is Not Applicable To The Government In This Case.

Estoppel is not applicable to the government in this case. As the Supreme Court held in Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947),

anyone entering into an arrangement with the Government takes the risk of having

*/ On November 11, 1977, Deputy Assistant Attorney General (DAAG) Schaffer, several Justice Department attorneys and FBI representatives met with plaintiff and his attorney in an attempt to explore ways in which the Department could accommodate plaintiff's demands for further releases of information. DAAG Schaffer first proposed giving office space to plaintiff in the Department of Justice building, then sending a paralegal to help plaintiff at his home, and finally paying plaintiff as a Justice Department consultant. Plaintiff neither accepted or rejected any of the proposals at that time. Lesar Declaration, Exhibit 2. Almost a week later, plaintiff did, however, make a counterproposal. One of the conditions under which he would agree to "prepare a list of noncompliances" was if he could do it at home. Lesar Declaration, Exhibit 3. Defendant does not dispute that if a consultancy arrangement could have been worked out, plaintiff would most likely have done the work at home. However, the issue of where the work was to be done is irrelevant to the question of the existence of the consultancy agreement, given the fact that so many other terms were never agreed upon.

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accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. (citations omitted).

This action clearly falls within those principles. Plaintiff admittedly has had quite a few dealings with the government and governmental officials. He surely must have been aware that such officials only have carefully limited authority. Even if he were not so aware, the burden is on the plaintiff to make sure that those officials have the authority he believes they have. Id.

In addition, defendant did not knowingly conceal any material fact from plaintiff. Since the burden is on those who deal with the government to ascertain the authority of the officials with whom they deal, defendant did not conceal anything at all from plaintiff. Furthermore, defendant could reasonably have assumed that someone with as much experience at dealing with the government as plaintiff has would know the limitations of official authority.

It must be restated that defendant categorically denies promising to pay plaintiff \$75.00 a hour as a consultancy fee. See Facts, supra; see also Lesar Declaration, Exhibit 22A. Thus, defendant could not reasonably have expected plaintiff to act on that nonexistent promise. In fact, defendant could not reasonably have expected any of the proposals it made during the course of negotiations to induce action on the part of the plaintiff because these proposals were clearly exploratory in nature and, as

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discussed above and in defendant's earlier memoranda, plaintiff should reasonably have realized that other terms needed to be agreed to before proceeding with the consultancy work. In addition, plaintiff himself consistently demanded a showing of good faith by the FBI as a condition of his working on the consultancy. No such showing was ever made to plaintiff's satisfaction. See, e.g., Lesar Declaration, Exhibits 3, 5, 8. As a result, defendant was reasonable in expecting that plaintiff would not act based on its exploratory proposals. Therefore, the doctrines of equitable and promissory estoppel are not applicable to this action.

CONCLUSION

Based on the foregoing discussion and on the discussion in defendant's memorandum of points and authorities in opposition to plaintiff's motion for partial reconsideration of Court's Order entered January 21, 1983, defendant respectfully requests that plaintiff's motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Defendant's Response to Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Partial Reconsideration of Court's Order Entered January 21, 1983 and Attached Declaration and Exhibits has been served on

James H. Lesar
1000 Wilson Blvd., Suite 900
Arlington, Virginia 22209,

attorney for plaintiff, by United States mail, postage prepaid, on this 22nd day of March, 1983.

Sara B. Greenberg
SARA B. GREENBERG