

RECEIVED  
MAR 11 1985  
CLERK OF THE UNITED  
STATES COURT OF APPEALS

IN THE

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

---

No. 82-1229

---

HAROLD WEISBERG,

APPELLANT/CROSS-APPELLEE

v.

U.S. DEPARTMENT OF JUSTICE

APPELLEE/CROSS-APPELLANT

---

AND CONSOLIDATED NOS. 82-1274,  
83-1722 and 83-1764

---

APPELLANT'S MEMORANDUM PURSUANT TO  
THIS COURT'S ORDER OF FEBRUARY 4, 1985

---

JAMES H. LESAR  
918 F Street, N.W., Suite 509  
Washington, D.C. 20004  
Phone: (202) 393-1921

Counsel for Weisberg

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, :  
 :  
 Appellant :  
 :  
 v. : Case No. 82-1229  
 :  
 U.S. DEPARTMENT OF JUSTICE, : (And Consolidated Nos. 82-  
 : 1274, 83-1722 and 83-1764)  
 Appellee :

APPELLANT'S MEMORANDUM PURSUANT TO  
THIS COURT'S ORDER OF FEBRUARY 4, 1985

PRELIMINARY STATEMENT

By per curiam order filed February 4, 1984, this Court sua  
sponte directed the parties to brief two issues with respect to  
this Court's jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346  
(a) (2), 1295(a) (2), namely:

(1) Whether this court has jurisdiction over appellant's FOIA claims, decided in Part II A in the panel opinion, when jurisdiction in the District Court was based, in part, on an alleged contract with the United States. The parties are directed specifically to address this court's jurisdiction vel non in light of the provisions conferring jurisdiction on the United States Court of Appeals for the Federal Circuit over appeals of suits based "in whole or in part" on contracts with the United States, 28 U.S.C. § 1295(a) (2). The parties are also directed to address the effects of the filing dates of the various consolidated appeals relative to the effective date of the statute enacting § 1295;

(2) Assuming that the answer to the foregoing question is in the affirmative, whether the court has jurisdiction over the contract and promissory estoppel claims decided in Part II B of the panel opinion, based upon pendant jurisdiction or any other branch of jurisdiction.

Consideration of these issues requires a brief review of pertinent parts of the procedural history in the District Court as they relate to these appeals.

On December 1, 1981, the District Court filed an <sup>2</sup>reopening <sup>?</sup> the action, which had been dismissed without prejudice five months earlier. [R. 224] In the same order and an accompanying Memorandum Opinion, the Court then disposed of pending Freedom of Information Act ("FOIA") issues, ruled that appellant Weisberg had "substantially prevailed" in the litigation, and granted Weisberg's motion for an order requiring the Department of Justice ("the Department") to pay him a consultancy fee. The Court also granted summary judgment in favor of the Department.

The Department moved for reconsideration of parts of the Court's order, including the parts requiring it to pay Weisberg a consultancy fee and finding that he had "substantially prevailed" in the litigation. [R. 225] On January 5, 1982, the District Court denied the Department's motion and dismissed the action. [R. 231]

On March 3, 1982, the Department appealed from the Court's orders requiring it to pay Weisberg a consultancy fee and ruling that he had "substantially prevailed." [R. 236] This appeal was

assigned D.C. Circuit No. 82-1229. On March 12, 1982, Weisberg cross-appealed. [R. 238] Weisberg's cross-appeal was assigned D.C. Circuit No. 82-1274. On motion by the Department, these appeals were stayed pending disposition of other motions in the District Court. April 8, 1982 order, United States Court of Appeals for the District of Columbia.

On January 20, 1983, the District Court filed an order awarding attorney's fees and costs to Weisberg. The Court also vacated its previous orders requiring the Department to pay Weisberg a consultancy fee and denying the Department's motion for reconsideration of that order. [R. 264] On January 31, 1983, Weisberg filed a timely motion for partial reconsideration of this order. On March 21, 1983, the Department appealed the January 21, 1983 order; the appeal was assigned D.C. Circuit No. 83-1363. On April 4, 1983, Weisberg cross-appealed; the cross-appeal was assigned D.C. Circuit No. 83-1380. These two appeals were subsequently dismissed for lack of appellate jurisdiction. Order of June 29, 1983, United States Court of Appeals for the District of Columbia.

On April 29, 1983, the District Court issued an order denying Weisberg's motion for partial reconsideration of its January 20, 1983 order. On June 28, 1983, the Department appealed, and on July 11, 1983, Weisberg cross-appealed. These appeals were assigned D.C. Circuit Nos. 83-1722 and 83-1764, respectively.

ARGUMENT

The Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(2), provides in pertinent part that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

of an appeal from a final decision of a district court of the United States . . . , if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title.

The effective date of the Federal Courts Improvement Act was October 1, 1982.

The first set of appeals (Nos. 82-1229 and 82-1274) occurred prior to the effective date of the Federal Courts Improvement Act. Although this means that Court of Appeals for the Federal Circuit did not obtain jurisdiction over these appeals, it does not mean that this Court did obtain jurisdiction. As this Court held in Green v. Department of Commerce, 618 F.2d 836, 839, 199 U.S.App. D.C. 352 (1980):

Subject to certain exceptions, the federal Courts of Appeals are limited in their jurisdiction to review of "final decisions of the district courts \*\*\*" 28 U.S.C. §1291 (1976). The order under review here is not such a "final decision." It cannot be char-

acterized as "final" in the sense of being an order that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).

(Footnote omitted) In the absence of certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the appeals here were interlocutory in nature. The District Court's orders did not dispose of all the claims involved in the underlying action. Specifically, the District Court had not disposed of Weisberg's federal contract claim because it still had to rule on the amount of the consultancy fee owed him. Notwithstanding these "appeals", the District Court retained jurisdiction over the contract claim and ultimately vacated its ruling that Weisberg was entitled to receive a consultancy fee.

Thus, because these appeals were brought before the effective date of the Federal Courts Improvement Act and were interlocutory in nature, they failed to confer jurisdiction of either this Court or the Court of Appeals for the Federal Circuit.

This Court properly dismissed the second round of appeals (Nos. 83-1363 and 83-1380) for lack of appellate jurisdiction because there was a valid motion for reconsideration of the order appealed from which was still pending at the time the appeals were taken. Consequently, this second round of appeals has no effect on the jurisdiction of either this Court or the Court of Appeals for the Federal Circuit.

The final round of appeals (Nos. 83-1722 and 83-1764) was taken after the effective date of 28 U.S.C. § 1295(a)(2). Because the District Court's jurisdiction was based in part on an alleged contract with the United States, the United States Court of Appeals for the Federal Circuit properly has jurisdiction over both the FOIA and the federal contract and promissory estoppel claims.

Assuming, arguendo, that this Court did acquire jurisdiction over the FOIA claims as a result of the March 1982 appeals despite the absence of a Rule 54(b) certificate, the jurisdiction it so acquired was limited to the FOIA claims and did not extend to the federal contract and promissory estoppel claims which were clearly interlocutory in nature. In contrast to the FOIA claims, certification of the federal contract and promissory claims under Rule 54(b) would have been a clear abuse of discretion.

The second issue posed by this Court's February 5, 1985 order is whether, assuming that it has jurisdiction over the FOIA claims decided in Part II A of the panel opinion, it has jurisdiction over the contract and promissory estoppel claims decided in Part II B of the panel opinion, based upon pendant jurisdiction or any other branch of jurisdiction. Weisberg contends that the answer to the second question is no. Pendent jurisdiction, which is a doctrine of discretion, not of right, exists

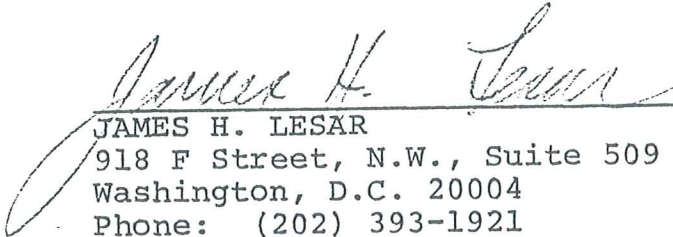
whenever there is a claim "arising under [the] Constituting, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . , " US Const, Art III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action

th

before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 US 103, 77 L ed 1062, 53 S Ct 549. The state and federal claims must derive from a common nucleus of operative fact.

United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). The FOIA claims and the contract and estoppel claims involved in this action do not derive "from a common nucleus of operative fact." Aside from the fact that same parties are involved, the FOIA and federal contract claims have no common element. The elements necessary to sustain the contract and promissory estoppel claims are entirely different from those involved in the determination of the FOIA claims. Accordingly, jurisdiction in this Court over the FOIA claims does not confer jurisdiction over the federal contract and promissory estoppel claims.

Respectfully submitted,

  
 JAMES H. LESAR  
 918 F Street, N.W., Suite 509  
 Washington, D.C. 20004  
 Phone: (202) 393-1921

Attorney for Weisberg

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of March, 1985, hand-delivered a copy of the foregoing Appellant's Memorandum Pursuant to this Court's Order of February 4, 1985 to the office of John S. Koppel, U.S. Department of Justice, Washington, D.C. 20530.

  
 JAMES H. LESAR