THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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Pending before the court are the Governments's Motion to Dismiss Counter Complaint, which the court grants, and Shayesteh's Motion to Strike the Affidavit of Gary Jensen, Shayesteh's Motion to Compel Discovery, and Shayesteh's Motion for Leave to Amend Answer, all of which the court denies.

II. DISCUSSION

Motion to Dismiss

Shayesteh has asserted his counterclaim under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq., for compensation for property allegedly taken by law enforcement officers. It is well established that under the FTCA that the United States as sovereign is immune from suit except as it consents to be sued. United States v. Mitchell, 445 U.S. 535, 538 (1980). Therefore, a counterclaim against the United States can be maintained only where the Government has consented or waived its immunity form suit. Pursuant to 28 U.S.C. § 2680(c) the United States retains its immunity from "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by an officer of customs or excise or any other law enforcement officer".

Without authority Shayesteh contends that immunity does not apply because the tort he complains of "resulted from the actions of the officers during their search and/or seizure of the property, not detention thereof." (Mem. Opp'n at 2). The essence of Shayesteh's counterclaim is that when the safe deposit box was opened, diamonds and additional currency were taken by law enforcement officers who in breach of their duty of care lost or stole the alleged property. Any purported distinction between detention and seizure for purposes of the present motion is not clear to the court. In the absence of persuasive authority or argument, Shayesteh's position is without merit.

Shayesteh next urges that the federal agents present when the safety deposit box was opened are not "other law enforcement officer[s]" for purposes of section 2680(c). The court disagrees. The Tenth Circuit, consistent with the majority view, reads section 2680(c) expansively to include federal law enforcement officers beyond those who assess taxes or collect customs duties. See Hatten v. White, 275 F.3d 1208, 1210 (10th Cir. 2002)(holding "that § 2680(c) applies where a prisoner alleges that defendant prison officials detained his personal property and mailed it outside the prison"); U.S. v. 2,116 Boxes of Boned Beef Weighing Approximately 154,121 Pounds, 726 F.2d 1481, 1491 (10th Cir.), cert. denied sub nom, Jarboe-Lakey Feedlots, Inc. v. United States, 469 U.S. 825

(1984)(U.S. did not waive its immunity under 28 U.S.C. § 2680(c) when USDA agents seized allegedly tainted beef products).

Finally, Shayesteh contends, without explanation, that the exception to immunity set forth in section 2680(c) applies in this instance. Under section 2680(c) an exception to immunity applies if:

> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense:
> (2) the interest of the claimant was not forfeited;
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal Criminal forfeiture law.

28 U.S.C. § 2680(c)(1-4). To come within this exception Shayesteh not only must show that his alleged property was seized for the purpose of forfeiture, but also that he was not convicted of a crime for which the property was subject to forfeiture. Shayesteh's counterclaim seeks monetary compensation for the alleged loss or theft of diamonds valued at $4,000,000.00 and $7,900.00 in allegedly missing currency. Here there was one warrant of arrest <u>in rem</u> which allowed the Government to seize $72,100 in currency. There is no viable claim that the alleged diamonds and additional currency were seized for purposes of a forfeiture. Moreover, Shayesteh stands convicted of a crime which,

assuming the alleged property were present, would necessarily be grounds for any forfeiture seizure. The court, therefore, finds that the section 2680(c) exception does not apply in the case.

Additionally, before Shayesteh may maintain an action under the FTCA he must first file a claim with the appropriate federal agency. 28 U.S.C. § 2675(a). He erroneously claims exemption for the foregoing because such a requirement does not apply "to such claims as may be asserted under the Federal Rules of Civil Procedure by ... counterclaim." Id. In the context of counterclaims, however, the statutory exemption of section 2675(a) has been interpreted to apply to compulsory counterclaims only. Spawr v. United States, 796 F.2d 279, 281 (9th Cir. 1986). For the reasons stated by the United States in its pleadings, the court finds that Shayesteh's counterclaim in not compulsory. Therefore, he is not exempt from the exhaustion requirement.

Motion to Strike the Affidavit of Gary Jensen

In a motion related to the Government's motion to dismiss, Shayesteh seeks to have the Affidavit of Gary Jensen stricken as insufficient because it does not account for the basis of Jensen's knowledge of the facts to which he attests. The court is satisfied that the relevant portions of the affidavit present admissible evidence and Shayesteh's motion is summarily denied.

Shayesteh's Rule 37 Motion to Compel Discovery

Shayesteh seeks to compel the United States to comply with his Request for Production of Documents and with his First Set of Interrogatories. A civil forfeiture action is governed by the Federal Rules of Civil Procedure, like any other federal civil litigation. See United States v. 51 Pieces of Real Property Roswell, N.M., 17 F.3d 1306, 1308-09 n.2 (10th Cir. 1994)(Federal Rules of Civil Procedure and Supplemental Rules for Certain Admiralty and Maritime Claims govern civil forfeiture actions in district court). United States v. $39,000 in Canadian Currency, 801 F.2d 1210, 1216 (10th Cir. 1986)(same). Pursuant to Rule 26(d), a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). See also Rule 33(a)("[w]ithout leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d)"). Rule 26(f) requires that, before the discovery process begins, the parties "confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan...". Although, DUCivR 16-1(a)(B), unless otherwise ordered by the court, exempts an incarcerated pro se party from compliance with Rule 26(f), here the court orders such compliance. The record before the court reflects that Shayesteh has refused to

engage in the required Rule 26(f) framing of a discovery plan, notwithstanding the Government's effort to establish communication with him in this regard via U.S. mail. Shayesteh's Motion to Compel, therefore, is denied. Because his Motion to Compel is denied, his request for Rule 37 sanctions is also denied.

Shayesteh's Motion for Leave to Amend Answer

Shayesteh seeks leave of court to amend his Answer to add an affirmative defense that the present action is barred by the statue of limitations. Because the court has previously addressed and rejected Shayesteh's statute of limitation defense, his motion is denies as futile. See Memorandum Decision and Order entered July 8, 2003.

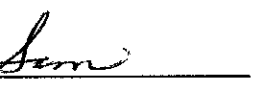
III. CONCLUSION

For the reasons stated, the United States' Motion to Dismiss Counter Complaint is **GRANTED**. Shayesteh's Motion to Strike, his Motion to Compel, and his Motion for Leave to Amend Answer are **DENIED**.

IT IS SO ORDERED.

DATED this 16th day of September, 2004.

BY THE COURT:



DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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United States District Court
for the
District of Utah
September 17, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00140

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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