

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)
 Plaintiff,)
)
 v.) Civil Action No. 89-2456
) (Consolidated)
)
REAL PROPERTY KNOWN AND)
NUMBERED AS 2847 CHARTIERS)
AVENUE, PITTSBURGH, PA)
including all improvements,)
fixtures, and appurtenances)
thereto or therein; et al.,)
 Defendants.)

R E P O R T

GARY L. LANCASTER,
United States Magistrate Judge

These consolidated complaints in civil forfeiture were filed pursuant to 18 U.S.C. § 1955, and 15 U.S.C. §§ 1172 and 1177. By these complaints, the government alleges that the defendant real and personal properties are forfeitable to it on the basis that the properties were used or intended to be used as part of an illegal gambling business in violation of federal law. Before the court are several dispositive motions which we address seriatim.

A.

Initially, we address the government's motion to strike the claims made by Roberta Flegel to real property known as 906 Chartiers Avenue. 906 Chartiers Avenue is the subject of the

forfeiture action originally filed at Civil Action No. 89-2459. The government also moves to strike Ms. Flegel's claim to nine video poker machines that were seized as part of the inventory of 906 Chartiers Avenue. The government moves to dismiss these claims on the basis that Ms. Flegel failed to file an answer to the complaint within twenty days after filing her claim as required by the Supplemental Rules for Admiralty and Maritime Claims, Rule C6.

The record shows that Ms. Flegel, through her counsel of record Sally Frick, Esquire, was served with a copy of the government's motion to strike her claims. Ms. Flegel has failed to respond to the motion to strike, even though our original pretrial order required a party to respond to a filed motion within eleven days thereafter.

The record also shows that, although notified, neither Ms. Flegel nor her counsel appeared at the March 6, 1992 status conference called with respect to these consolidated cases.

The record also shows that although notified, neither Ms. Flegel nor her counsel appeared at the May 12, 1992 settlement conference called with respect to these consolidated cases. Therefore, we can only presume that Ms. Flegel has abandoned her claims and the motion to strike should be granted.

B.

Next, the government moves to strike the claim of John F. Connelly, on behalf of Three Rivers Coin, Inc., to \$200.00 in cash. The \$200.00 is part of the property subject to the forfeiture action originally docketed at Civil Action No. 90-735. However, at a status conference, counsel for Mr. Connelly made clear that his client made no claim to the \$200.00. Therefore, this motion to strike should be denied as moot.

C.

The government next moves to strike the claim of the American Legion Post No. 82 to \$14,766.98 in cash. This money is part of the property subject to the civil forfeiture action originally docketed at Civil Action No. 90-735. Again, the government moves to strike because the American Legion failed to file its answer within twenty days after having filed its claim. In response, the American Legion has now filed its answer.

The government contends that it is entitled to relief because the untimely filing has prejudiced it in framing discovery and preparing its case. This argument rings hollow in light of the undisputed fact that the government failed to undertake discovery against any claimant in these consolidated cases. We fail to see where the government has in any way been prejudiced by the

American Legion's untimely filing and to the extent that the American Legion should have requested permission to file nunc pro tunc, such permission is granted. The government's motion to strike the claim should be denied.

D.

Finally, we address the government's motion to dismiss the complaint for declaratory judgment filed by Professional Video Associates ("PVA"). The complaint was originally filed at Civil Action No. 91-2192. By the complaint, PVA seeks a declaratory judgment that three identifiable video poker machines owned by it are not gambling devices within the meaning of federal law. These three machines were seized as part of the inventory found at 3100 Windgap Avenue. That real property was seized on July 19, 1990 by the government pursuant to a civil warrant of arrest issued and originally filed at 89-2486.¹

The three machines are not the subject of any pending action in civil forfeiture nor are the owners thereto subject to any pending criminal action. In fact, at a point subsequent to our March 6, 1992 status conference and before the May 12, 1992 pretrial

1. For some reason, PVA filed a "petition" for declaratory judgment as part of Civil Action No. 89-2486 but before resolution simply filed a new complaint under 91-2192. However, their petition and complaint are identical in substance and a resolution to the complaint will also resolve the earlier filed "petition."

conference, the three machines were returned to the owner, PVA. Given these facts, the government contends that there exists no actual case or controversy between the parties. Thus, the case should be dismissed for want of jurisdiction.

PVA responds that even though no legal action is now pending, the government may initiate such in the future. As a matter of law, PVA's argument is well-founded. Simply because there is no pending legal action related to these particular machines does not, of necessity, mean that there is no case or controversy sufficient for declaratory judgment. This is the conclusion reached in Pennsylvania Video Operators v. United States, 731 F. Supp. 717 (W.D. Pa.), aff'd without op., 919 F.2d 136 (3d Cir. 1990). There the government raised a similar argument in its motion to dismiss a petition for declaratory judgment filed by the owners of certain alleged gambling devices. Those devices had not yet been seized, and were not subject to any pending legal action. The court rejected the government's jurisdictional argument and determined,

The purpose of a declaratory judgment action in this context is to obtain a ruling on a plaintiff's criminal liability without the plaintiff having to subject himself to criminal prosecution. Such an action is appropriate if a plaintiff can establish the existence of an "actual controversy," i.e., that the threatened prosecution is real and imminent rather than imaginary or speculative. (citation omitted)

Id. at 718. The court then factually determined that the United States Attorney had made several unequivocal publicized statements

that it intended to institute civil forfeiture actions and criminal proceedings in the future. On that basis, the court held that the threat of legal action was real and the case or controversy element satisfied. Id. at 719.

However, in the instant case we have the completely opposite factual context. In support of its motion, the government submitted the affidavit of its Assistant United States Attorney Almon S. Burke, Jr. By the affidavit, the government stated

The United States has declined to proceed against Michael J. Horavan, PVA, or the three PVA machines either by criminal prosecution or through forfeiture proceeding and has offered the return of the machines seized on or about July 19, 1990 on a number of occasions as set forth in the foregoing paragraph.

[paragraph 11]

It appears to this court that the government has made an unequivocal representation that it has decided not institute any legal action relating to these machines.² We see no reason not to take the government at its word. Moreover, should the government hereafter attempt such legal action, the doctrine of judicial estoppel should preclude it from doing so.³

2. PVA acknowledge that the government offered to return the machines. When and under what circumstances that offer was made is a apparently a matter of some acrimonious dispute between the litigants.

3. The doctrine of judicial estoppel provides that, when a litigant has obtained relief from an adversary by asserting one
(continued...)

Accordingly, the government's motion to dismiss should be granted.

United States Magistrate Judge

Dated: June 15, 1992

cc: All Counsel of Record

3. (...continued)
position, he may not contradict himself later by making a second claim against the same adversary that is inconsistent with his earlier contention. Erie Telecomm. Inc. v. City of Erie, 659 F. Supp. 580, 589 (W.D. Pa. 1987); Carey v. Electric Mut. Liab. Ins Co., 500 F. Supp. 1227, 1229 (W.D. Pa. 1980). The purpose of th doctrine is to prevent a litigant from playing "fast and loose" with the courts. Scarano v. Central R. Co., 203 F.2d 510, 513 (Cir. 1953); Wade v. Woodings-Verona Tool Works, Inc., 469 F. Sup 465 (W.D. Pa. 1979).

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ആന്തരിക ക്രമീകരണങ്ങൾ, ഭരണാനുമതിക്കായ്

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