

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 91-1394  
Summary Calendar  
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM H. ADDINGTON, ET AL.,

Defendants,

WILLIAM H. ADDINGTON,

Defendant-Appellant,

S)))))))))Q

Appeal from the United States District Court for the  
Northern District of Texas  
(CA-4-84-125-AG)  
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(January 26, 1993)

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.\*

GARWOOD, Circuit Judge:

Although the United States initiated this civil lawsuit in an attempt to recover on a judgment it had previously obtained against

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

defendant William H. Addington (Addington), the only issues before us on appeal concern Addington's attempted counterclaims for conspiracy and his request for a jury trial on those claims. Because we determine that the district court did not abuse its discretion in finding that Addington's counterclaims did not comply with Fed. R. Civ. P. 8 and that there was no statutory right to a jury trial on the counterclaims, we affirm the judgment of the district court.

### **Facts and Proceedings Below**

In the 1960's and early 1970's, Addington operated public grain elevators in Kansas under the name of Addington Grain Company, Inc. The Commodity Credit Corporation (CCC), an agency of the United States, was a large depositor of grain at one of Addington's elevators. The United States brought suit against Addington in the United States District Court for the District of Kansas to recover overpayments made to Addington by the CCC, alleging that Addington had submitted false warehouse charges to the CCC for grain not stored in the elevators at the times covered by the invoices. On February 7, 1972, the United States obtained a judgment against Addington in the amount of \$8,000.<sup>1</sup>

On July 17, 1981, the government registered the judgment in the United States District Court for the Northern District of

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<sup>1</sup> Addington has paid only \$1,000 on this judgment; this payment was applied to satisfy interest on the debt, which accrues at 6 percent per annum.

Texas, pursuant to 28 U.S.C. § 1963.<sup>2</sup> The government recorded abstracts of the judgment with the Office of the County Clerk of Tarrant County, Texas, on October 27, 1981, and November 5, 1982. In October 1982, Addington conveyed several parcels of real property located in Tarrant County to Genna F. Donihoo (Donihoo), the woman with whom he was then living. This conveyance was not supported by any consideration; further, Addington was insolvent at the time of the conveyance.

The United States filed this lawsuit against Addington, Donihoo, Mineral Wells Savings and Loan Association, and Nowlin Mortgage Company.<sup>3</sup> The government sought to foreclose its judgment lien on the properties conveyed to Donihoo;<sup>4</sup> in the alternative, the government alleged that the transfer of the properties was made with the intent to defraud the United States and sought an order setting aside the transfer and declaring it void. The government later amended its complaint to request that its judgment lien be

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<sup>2</sup> The magistrate noted that the government never filed an actual copy of the Kansas judgment with the Northern District of Texas, as is required by 28 U.S.C. § 1963; the court did not address this lapse, however, as it found that the government was precluded from foreclosing on the judgment because the judgment had become dormant and was no longer subject to revival under Kansas law well before the time of its registration in the Northern District of Texas.

<sup>3</sup> Mineral Wells Savings and Loan Association and Nowlin Mortgage Company held liens on the conveyed properties; these defendants were later dismissed by consent of the parties.

<sup>4</sup> Addington transferred five properties to Donihoo. The First State Bank of Milford foreclosed upon two of these properties. The magistrate found that the government sought to foreclose on the remaining three, although the government's complaint described only two of these properties.

deemed revived, in the event the district court determined that the lien had become dormant before it was recorded in Tarrant County.

Addington answered and filed a counterclaim under the Federal Tort Claims Act (FTCA), claiming that the government had obtained the judgment through a conspiracy to embezzle Addington's grain and money and to convict him falsely of embezzlement. Addington sought compensatory damages of \$100 million and requested a jury trial on his counterclaim. Upon motion by the government, the district court dismissed the counterclaim without prejudice on the grounds that Addington had failed to comply with the administrative notice requirements of his claim against the United States, 28 U.S.C. § 2675, and that his counterclaim did not comply with Rule 8 of the Federal Rules of Civil Procedure. Addington filed an amended counterclaim with leave of court. The government reurged its motion to dismiss, and the district court dismissed Addington's amended counterclaim, this time with prejudice. The district court also denied Addington's request for leave to file a second amended counterclaim.

Addington and Donihoo made several demands for a jury trial. The district court denied these demands, and the parties later consented to trial without a jury before the United States Magistrate. The magistrate ordered that the United States take nothing, ruling that the Kansas judgment was not a valid and subsisting judgment at the time the United States attempted to

register it in Texas<sup>5</sup> and that therefore the United States did not have an enforceable lien on any of Addington's property in this action because it had failed to register a valid judgment. The magistrate also held that Addington's conveyance of property to Donihoo was fraudulent and thus voidable under applicable Texas law.<sup>6</sup>

This appeal followed the denial of the government's motion for a new trial.<sup>7</sup> Addington filed a notice of appeal, challenging the district court's dismissal of his counterclaims for conspiracy and of his request for a jury trial. Donihoo filed an appellate brief raising the same issues as Addington, but she did not file a notice of appeal (Addington's notice of appeal did not purport to be filed on Donihoo's behalf). Donihoo's claims are not properly before us. *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2408 (1988); *Griffith v. Johnston*, 899 F.2d 1427, 1429-1430 (5th Cir. 1990).

The United States filed a notice of cross-appeal, contesting both the magistrate's decision that the government take nothing in its suit to foreclose on Addington's property and the magistrate's holding that the United States is bound by law to seek revival or

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<sup>5</sup> Kansas law provides that a judgment is dormant if five years pass without execution; a dormant judgment may be revived within two years of the time it became dormant. See Kansas Statutes Annot. 60-2403, 60-2404. Because the United States did not attempt to register the judgment until July 17, 1981, over nine years from the date the judgment was issued, its judgment was dormant and could no longer be revived.

<sup>6</sup> Addington does not appeal this ruling.

<sup>7</sup> The parties agreed, in their consent to a trial to the magistrate, that any appeal from the magistrate's ruling would be to this Court rather than to the district court.

execution of judgments within the time periods established by state law. This Court later granted a motion by the government to dismiss its cross-appeal. The only issues before us on appeal, therefore, are those raised by Addington concerning the denial of his counterclaim and jury demand.

### **Discussion**

#### **I. Dismissal of Counterclaims**

The district court dismissed Addington's counterclaim on two grounds: (1) failure to exhaust administrative remedies, 28 U.S.C. § 2675; and (2) failure to conform to the requirement of a short plain statement of the cause of action, Fed. R. Civ. P. 8 (Rule 8). We agree that dismissal was proper under Rule 8.

The government contended, and the district court accepted, that the court lacked jurisdiction over the counterclaim because Addington had not exhausted his administrative remedies. 28 U.S.C. section 2675(a) provides in part that:

"An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."<sup>8</sup>

The section continues, however: "*The provisions of this subsection shall not apply to such claims as may be asserted under the Federal*

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<sup>8</sup> This requirement has been held to be jurisdictional. *Shah v. Quinlin*, 901 F.2d 1241, 1244 (5th Cir. 1990); *Gregory v. Mitchell*, 634 F.2d 199, 203-204 (5th Cir. 1981).

*Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.*" 28 U.S.C. § 2675(a) (emphasis added.) Because Addington purported to raise his FTCA claims as a counterclaim, arguably he was not required to present his claim first to the CCC or other federal agency.

The district court also held, however, that Addington failed to comply with Rule 8 of the Federal Rules of Civil Procedure. We review a dismissal pursuant to Rule 8 for an abuse of discretion. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).

Rule 8(a) requires that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The court's fair description of Addington's original counterclaim demonstrates the propriety of dismissal under this rule:

"Defendant's pleading consists of eighty-seven (87) paragraphs in which he apparently attempts to allege the existence of an ongoing conspiracy, which has been carried out by numerous parties since 1960 or later. The Defendant fails to set out specific dates, or acts of individuals but the group of alleged conspirators includes the Department of Justice, state and federal judges, the President, former Presidents, the Supreme Court, Congress, at least two national banks, officials of the Commodity Credit Corporation, and officials at the Defendant's own grain company. The Defendant even includes at some length his explanation of how President Johnson and J. Edgar Hoover planned the assassination [sic] of President Kennedy."

The district court dismissed the original counterclaim without prejudice. Addington was allowed to amend his original counterclaim, which he proceeded to do, armed with the knowledge of

what was required of his claims. The result was not sufficient to prevent a second dismissal on Rule 8 grounds: the amended counterclaim, although shorter than the original and with more alleged conspirators named, does not allege specific occurrences or reasonably approximate dates, and thus it does not provide a basis for Addington's allegations of a conspiracy against him.<sup>9</sup> "A district court and opposing parties are not required to forever sift through such pleadings after [Addington had] been given notice of the pleading requirements of his case." *Old Time Enter., Inc. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989). See also *Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985) (affirming dismissal of complaint where plaintiff, informed of deficiency in complaint, did not amend to remedy defect).

Because Addington has proceeded *pro se* from the inception of this lawsuit, the district court was required to construe his pleadings liberally. *Haines v. Kerner*, 92 S.Ct. 594, 596 (1972); *Wesson v. Oglesby*, 910 F.2d 278, 281 (5th Cir. 1990). However, the court cannot create a cause of action from pleadings where none exists. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("[W]e do not believe it is the proper function of the district court to assume the role of advocate for the *pro se* litigant."). Addington has failed to set forth a claim for relief in anything

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<sup>9</sup> The district court, in dismissing the amended counterclaim, correctly found it to be "replete with vague and confusing allegations, evidentiary statements and conclusions which obscure any valid cause of action which may exist. The Court is not required nor inclined to indulge the Defendant by sifting through his pleadings to determine whether or not a valid claim for relief is present."



even approaching a coherent manner, and even his *pro se* status cannot preserve his counterclaims from dismissal. We conclude that the district court did not abuse its discretion in dismissing the counterclaim for failure to conform with Rule 8.

## II. Denial of Jury Trial

Addington asserts that the district court erred in denying his request for a jury trial. Although it is difficult to determine from the record whether Addington was seeking a jury trial on the government's complaint, on his counterclaim, or both, we construe his request to be for a jury trial on the counterclaim that was dismissed.<sup>10</sup>

The district court denied a jury trial on the counterclaim on statutory grounds. 28 U.S.C. § 2402 provides that, subject to a single exception not applicable here,<sup>11</sup> an action brought against the United States under the FTCA shall be tried by the court sitting without a jury. This statute makes clear that Addington was not entitled to a jury trial on his claim under the FTCA. See

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<sup>10</sup> Although there is some evidence that Addington also demanded a jury trial on the government's complaint, we agree with the district court that he was not so entitled. The United States was requesting only equitable relief, in the form of a foreclosure on Addington's properties, a voidance of the transfer of the properties to Donihoo, and a declaration that its Kansas judgment was not invalid. There is no right to a jury on equitable claims. *Gorenflo v. Texaco, Inc.*, 735 F.2d 835, 838 (5th Cir. 1984).

<sup>11</sup> 28 U.S.C. § 2402 provides that an action against the United States under 28 U.S.C. § 1346(a)(1) shall be tried to the court with a jury upon request by a party to the action; section 1346(a)(1) governs civil actions against the United States for recovery of monies wrongfully collected under the internal revenue laws.

*United States v. Neustadt*, 81 S.Ct. 1294, 1297 n.10 (1961) ("There is no right to a jury trial under the Tort Claims Act."). Addington attempted to avoid this statute by distinguishing his counterclaim from a complaint. This is to no avail. "[R]egardless of the formal posture of the United States in the litigation[,]

. . . if a claim is asserted against the United States, there is no right to trial by jury unless granted by statute, even though the action was commenced by the United States." 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2314, at 71 (1971). See *United States v. Rosati*, 97 F.Supp. 747, 749 (D.N.J. 1951) ("The issues of law and fact raised by the counterclaim . . . can and will be tried by the court without a jury, in accordance with Title 28 U.S. Code, § 2402. The counterclaim must be treated as an action against the United States and must be tried in the manner provided by statute."). See also *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 716 F.Supp. 268, 273 (S.D. Miss. 1989) (analogizing FTCA prohibition of jury trials to counterclaim under Foreign Sovereign Immunities Act).

Further, we find that Addington waived his demand for a jury trial when he conceded, in response to the government's motion to strike the jury demand, that his counterclaim should be heard without a jury.

We conclude that the district court did not err in denying Addington's request for a jury trial on his counterclaim. In any event, the counterclaim was properly dismissed before trial.

### **Conclusion**

For these reasons, the judgment of the district court is

AFFIRMED.