

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 91-5537

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MANUEL M. BENAVIDES, JR.  
d/b/a Geomet Mfg. Co.,

Plaintiff-Appellant,

versus

JULIO PEREZ, Director for  
U.S. Small Business Administration,  
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA-89-CA-0608)

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(August 6, 1993)

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:\*

Manuel M. Benavides brought this action against employees of the United States Small Business Administration (SBA) in both their official and individual capacities. Benavides asserts that defendants violated his Fifth Amendment right to due process by taking possession of collateral pledged to secure a loan that was in default without providing him with notice. The district court

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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 Pursuant to that rule, we have determined that this opinion should not be published.

granted summary judgment in favor of defendants on the basis of absolute and qualified immunity, and Benavides appeals from that judgment. We find that Benavides' claims against the defendants in their official capacities are barred by the doctrine of sovereign immunity. We also find that Benavides has contractually waived the alleged due process right to notice which is the basis for his claims against defendants in their individual capacities. Accordingly, we affirm the district court's grant of summary judgment in favor of defendants.

**I**

**A**

On January 26, 1983, Geomet, Inc. borrowed \$21,400 from Exchange National Bank; and Manuel M. Benavides, Geomet's president, personally guaranteed the resulting note. To secure the loan, Exchange also obtained a security interest in Geomet's equipment, inventory, and accounts receivable.

By May 1984, Geomet was in default on its loan for more than six monthly installments. Pursuant to a deferred-participation agreement between Exchange and the SBA, the SBA purchased the loan from Exchange. To enable Geomet to obtain additional financing so that it could keep operating, the SBA deferred the delinquent payments and subordinated its lien on Geomet's accounts receivable and inventory.

In June 1986, the Geomet loan was again in default, this time for payments due from May 26, 1985. A foreclosure sale was scheduled, but it was then cancelled following a conversation

between Benavides and Julio Perez, Director of the SBA. During that conversation, Benavides agreed to bring the Geomet loan up-to-date by paying the delinquency and to then keep the loan current. Benavides paid the delinquency in August 1986.

In February 1987, the SBA again subordinated its lien on Geomet's accounts receivable to permit Benavides to obtain additional financing. However, the loan became delinquent once again almost immediately. Benavides then (1) gave the SBA a check for the February 1987 payment which was returned for insufficient funds, (2) missed the March 1987 payment, and (3) gave the SBA two more checks in April 1987 which also were returned for insufficient funds.

On May 4, 1987, the SBA's Geomet file was transferred to Diana Amador, a SBA liquidation officer, for liquidation of the loan collateral.<sup>1</sup> On May 6, Amador and Howard "Frog" Adams, an auctioneer, visited the Geomet premises and changed the locks; although the SBA claims that efforts were made to contact Benavides before changing the locks, the parties agree that those alleged efforts were unsuccessful. On May 8, Benavides received a letter from Amador--a letter dated May 1 but postmarked May 7--stating that \$1,554.00 was past due, and that this amount had to be paid by May 6 to avoid acceleration and foreclosure. On May 12, Benavides hand-delivered a money order to the SBA for \$1,554.00. On May 13, the SBA accelerated and demanded payment

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<sup>1</sup> The SBA claims that Geomet was three months in default on its loan at this time, while Benavides claims that he was only two months in default.

for the full indebtedness under the loan, and, on May 14, it returned the \$1,554.00 money order to Benavides on the ground that it did not constitute payment of the note in full. Benavides received notice on May 15 that the Geomet loan collateral would be sold on May 20.

On May 18, 1987, the SBA discovered that its letter demanding payment of the loan in full was never sent to Geomet. The SBA then cancelled the auction set for May 20, reinstated the Geomet loan, and agreed to accept Benavides' \$1,554.00 money order. Geomet reopened for business on May 20. Moreover, on October 29, 1987, to further assist Geomet in handling cash flow problems, a loan payment was deferred--thereby extending the loan's maturity date. Nevertheless, in April 1988, due to default from November 1987 through May 1988, the loan was placed in liquidation status once again. Benavides gave the SBA peaceful possession of the collateral in May 1988, and a public foreclosure sale resulted in a net recovery of \$3,641.41.

#### **B**

Benavides, proceeding pro se, brought this action in federal district court against James Abdnor (district director of the SBA), Amador, and Julio Perez (director of the SBA), claiming that his Fifth Amendment due process rights were violated based upon Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971) (addressing claims of relief for

constitutional torts).<sup>2</sup> Specifically, according to Benavides, his constitutional rights to due process were violated when the locks on the Geomet premises were changed without his first being notified, and, as a result of the SBA's actions, he sustained damages in excess of \$145,000.<sup>3</sup> The SBA counter-claimed against Benavides and his wife, Brenda Benavides, for the amount owing on the promissory note--\$8,297.55 in principal, \$1,836.12 in interest accrued as of June 21, 1989, and interest from June 21, 1989 until judgment at a daily rate of \$2.27.

The parties then moved for summary judgment, the defendants asserting that Benavides' claims against them in their official and individual capacities are barred by the doctrines of sovereign and qualified immunity, respectively. The district court adopted the recommendations of a magistrate judge and granted defendants' motion for summary judgment, denied Benavides' motion for summary judgment, and awarded the United States (1) principal in the amount of \$7,000.95, (2) interest accrued as of November 2, 1989 in the amount of \$1,850.45, (3) interest at a daily rate of \$1.92 from November 2, 1989 until judgment, and (4) post-judgment interest at the rate allowed by

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<sup>2</sup> Although Benavides only appeals from the district court's judgment regarding his Fifth Amendment claim, he also raised other federal and pendant state law claims below.

<sup>3</sup> The record establishes that the orders that Benavides was actually forced to cancel because of the approximately two-week period during which the SBA took possession of the Geomet premises totalled \$33,750.00.

law on the total amount of principal and accrued interest. Benavides appeals from that judgment.

## II

In reviewing a grant of summary judgment, we apply the same standard as the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989) (we review grants of summary judgment de novo). Specifically, we ask whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In making this determination, we view all of the evidence and inferences drawn from that evidence in the light most favorable to the party opposing the motion for summary judgment. Reid v. State Farm Mutual Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). Finally, we may affirm a grant of summary judgment on any appropriate grounds and, therefore, we are not constrained to rely upon the grounds articulated by the district court. See Harbor Ins. Co. v. Urban Constr. Co., 990 F.2d 195, 199 (5th Cir. 1993); Coral Petroleum, Inc. v. Banque Paribus-London, 797 F.2d 1351, 1355 n.3 (5th Cir. 1986); see also Davis v. Liberty Mut. Ins. Co., 525 F.2d 1204, 1207 (5th Cir. 1976).

## III

### A

In appealing from the district court's grant of summary judgment in favor of defendants, Benavides challenges the

district court's determination that the doctrine of absolute immunity bars his claims against defendants in their official capacities. Benavides' claims against defendants in their official capacities constitute claims against the United States. See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). "The United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941); see also United States v. Mitchell, 445 U.S. 535, 538 (1980). "A waiver of sovereign immunity `cannot be implied but must be unequivocally expressed.'" Mitchell, 445 U.S. at 538, quoting United States v. King, 395 U.S. 1, 4 (1969). Because the Constitution does not waive sovereign immunity, such a waiver must be contained in a statute giving rise to the alleged cause of action. See Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 410 (1971); Lynch v. United States, 292 U.S. 571, 579-81 (1934).

To establish a waiver of sovereign immunity in the case at issue, Benavides relies upon section 15 U.S.C. § 634(b)(1), which states that the SBA may "sue or be sued." Although section 634(b)(1) constitutes a waiver of sovereign immunity as to contractual claims, it does not constitute such a waiver for tort claims. See Taylor v. Administration of the Small Bus. Admin., 722 F.2d 105, 109 (1983). If claims such as those Benavides alleges are to "be brought at all, [they] must be brought under

the [Federal Tort Claims Act (FTCA)], subject to all of the limitations and safeguards in the Act." Id.

A FTCA claim cannot be prosecuted in district court unless (1) the claimant has first presented it to the appropriate federal agency and his claim has been denied or (2) there has been no final disposition of the claim within six months after it has been filed. 28 U.S.C. § 2675(a). Because Benavides never presented his claim to the appropriate federal agency, we conclude that the district court properly granted summary judgment in the government's favor. Taylor, 722 F.2d at 110; Reynolds v. United States, 748 F.2d 291, 292-93 (5th Cir. 1984); Gregory v. Mitchell, 634 F.2d 199, 203-04 (5th Cir. 1981).

#### **B**

Benavides also challenges the district court's determination that the doctrine of qualified immunity is a defense to his claims against defendants in their individual capacities. The first analytical step in determining whether a plaintiff's allegations are sufficient to overcome a defense of qualified immunity asserted in a motion for summary judgment is to determine whether the plaintiff's "allegations, even if accepted as true, . . . state a claim of any rights secured to him under the United States Constitution." See Siegert v. Gilley, \_\_\_ U.S. \_\_\_, \_\_\_, 111 S. Ct. 1789, 1793 (1991); see also Quives v. Campbell, 934 F.2d 668, 670 (5th Cir. 1991). We need not decide whether Benavides had a due process right to notice prior to the SBA taking possession of the Geomet collateral because we find



that, even if Benavides did have such a right, he has contractually waived it.

In taking possession of the Geomet collateral, the SBA acted pursuant to section 9.503 of the Uniform Commercial Code (UCC), which is codified under Texas law as section 9.503 of the Texas Business and Commerce Code. Section 9.503 provides that:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

TEX. BUS. & COMM CODE ANN. § 9.503 (Vernon) (emphasis added). There is no statute or regulation requiring the notice Benavides claims he was entitled to.<sup>4</sup> Looking to the loan instruments which created the security interest in Geomet's collateral, paragraph 16 of the security agreement states that:

Whenever a Default shall exist, the Secured Party may, at its option and without demand or notice, declare all or any part of the unpaid balance of the Amount Financed plus accrued Finance Charges of the Secured Obligations immediately due and payable, and the Secured Party may exercise, in addition to the rights and remedies granted hereby, all rights and remedies of a Secured Party under the Uniform Commercial Code, . . . including the right to take possession of the collateral.

The guaranty agreement contains an express waiver of demand and notice regarding collateral in the event of default.

Specifically, it provides that:

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<sup>4</sup> We note, therefore, that paragraph 17 of the security agreement which provides that, "if notification of disposition of collateral is required by law, such notification must be mailed at least ten days before such disposition . . . [,]" does not help Benavides.

The Undersigned hereby grants to Lender full power, in its uncontrolled discretion and without notice to the undersigned, . . . to deal in any manner with the Liabilities and the collateral, including, but without limiting the generality of the foregoing, the following powers:

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(e) In the event of the nonpayment when due, whether by acceleration or otherwise, of any of the Liabilities, or in the event of default in the performance of any obligation comprised in the collateral, to realize on the collateral or any part thereof . . . .

And the note itself provides that:

Upon the nonpayment of the Indebtedness, or any part thereof, when due, whether by acceleration or otherwise, Holder is empowered to sell, assign, and deliver the whole or any part of the Collateral at public or private sale, without demand, advertisement or notice of the time or place of sale, . . . which are hereby expressly waived.<sup>5</sup>

The parties do not dispute that the SBA acted in accordance with the UCC and Texas law,<sup>6</sup> and that Benavides had no statutory or regulatory right to be notified prior to the SBA taking possession of the Geomet loan collateral. Benavides asserts, however, that the defendants violated his Fifth Amendment right to due process by changing the locks on Geomet without providing him with adequate notice. Specifically, according to Benavides,

[t]he SBA [p]ersonnel, acting on behalf of the federal government, were required to give Mr. Benavides the minimal Fifth Amendment protection of notice and an opportunity to be heard before seizing his business, notwithstanding the fact that the UCC would not require such notice from a private party. Moreover, that

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<sup>5</sup> Emphasis has been added.

<sup>6</sup> Also, Title 13 C.F.R. 120.204, the regulation indicating (1) what constitutes a default for SBA purposes, (2) when liquidation should be resorted to, and (3) how property may be sold, contains no specific notice provision.

fundamental Fifth Amendment Obligation is so clear the SBA [p]ersonnel cannot plausibly avoid it.

It is well established that due process rights may be contractually waived. See D.H. Overmyer v. Frick Co., 405 U.S. 174, 185-87 (1972) (holding that, where a party freely entered a contract which waived notice and a hearing prior to the entry of a default judgment, the party had waived its due process rights); Erie Telecommunications v. City of Erie Pennsylvania, 853 F.2d 1084, 1094-96 (3rd Cir. 1988) (finding that a release meets the requirements for a valid contractual waiver); see also Carter v. Sea Land Services, Inc., 816 F.2d 1018, 1021 (5th Cir. 1987) ("Parties may waive even fundamental rights, including the right to be free from self-incrimination, the right to be free from unreasonable searches and seizures, the right to a jury trial, and, by pleading guilty, the right to trial itself.") (citations omitted). And, "[o]nce a right, even a fundamental right, is knowingly and voluntarily waived, a party has no constitutional right to recant at will." Carter, 816 F.2d at 1021 (refusing to withdraw a validly given consent to trial before a magistrate.). To determine whether due process rights have been contractually waived, we must look to the facts of the particular case. United States v. Wynn, 528 F.2d 1048, 1050 (5th Cir. 1976). Among the factors we may consider are the clarity of the contractual language, the borrower's ability to understand, and the relative bargaining power of the parties. Overmyer, 405 U.S. at 186; Wynn, 528 F.2d at 1050.

The waiver-of-notice covenants in the security agreement, guaranty agreement, and note are unambiguous and, by signing these instruments, Benavides waived the alleged right to due process which he asserts in this action. Specifically, as recognized by the district court, these instruments informed Benavides that any delinquency could result in an action against the Geomet collateral without notice, and the record establishes that Benavides knew he was delinquent on May 6, the day the SBA took possession of the Geomet collateral. In fact, Benavides had been delinquent several times before and avoided his collateral being repossessed only through the willingness of the SBA to give him and his business more chances to pay on the loan.

The record also establishes that the waiver-of-demand provisions are wholly the result of Benavides approaching Exchange to obtain a commercial loan for Geomet and the bank's willingness to make that loan in exchange for adequate security. Specifically, Benavides was able to obtain a loan from Exchange by providing a personal guaranty, security in Geomet's collateral, and by agreeing to the provisions at issue which ensured Exchange that it would be able to take immediate possession of the security should Benavides default on his loan. It is also evident on the face of the loan instruments that Benavides and Exchange fully anticipated that the SBA could become the holder of the Geomet note and loan instruments. And Benavides has never asserted that the waiver-of-demand provisions at issue are the result of any imbalance of bargaining power or

any inability on his part to understand their implications. In fact, Benavides brought this action below pro se, and, based upon our review of his pleadings, we are able to conclude that Benavides was capable of understanding the implications of the express language of the provisions at issue. Accordingly, we conclude that Benavides has waived the due process rights he asserts in the case before us.<sup>7</sup> Cf. Johnson v. United States Dep. of Agriculture, 734 F.2d 774, 784 (11th Cir. 1984) (concluding that there was a substantial likelihood that plaintiffs waived their due process rights, but remanding in light of expert testimony that most of the plaintiffs were unable to comprehend the Farmers Home Administration documents).

#### IV

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of the defendants.

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<sup>7</sup> The fact that Benavides has contractually waived the due process rights he asserts in the case before us differentiates this case from Arcoren v. Peters, 829 F.2d 671 (8th Cir. 1987) (en banc), cert. denied, 485 U.S. 987, \_\_\_ S. Ct. \_\_\_ (1988) and Vail v. Derwinski, 946 F.2d 589 (8th Cir. 1991), amended, 956 F.2d 812 (1992).