UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7633
Summary Calendar

ENPLANAR, INC., ET AL.,

Plaintiffs,

JEAN H. TURNER, Trustee of
V. KEELER & CO., INC.,

Appellant,

VERSUS

JOHN MARSH, Secretary of the Army of
the United States, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-J91-0413(R)(C))

(June 2, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges:

PER CURIAM:[1]

V. Keeler & Co., Inc., appeals the dismissal of its claim for lack of subject matter jurisdiction. We **AFFIRM**.

I.

Keeler and other minority contractors initiated this action in the Eastern District of Louisiana against various defendants,

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

asserting claims relating to the administration of the 8(a) (minority set-aside) program in Mississippi and Louisiana. All of the counts in that complaint were dismissed, except for Count VI, which was transferred to the Southern District of Mississippi. We affirmed the dismissal of the other counts. ***Enplanar, Inc. v. Marsh***, 11 F.3d 1284 (5th Cir. 1994).

This appeal concerns the dismissal of Count VI for lack of subject matter jurisdiction, after transfer to the Southern District of Mississippi. Count VI is a claim against "the Corps of Engineers and the Vicksburg Corps" for an unspecified amount of damages.[2] Keeler was allegedly designated by the defendants to negotiate for and, if negotiations were concluded in accordance with applicable regulations, to receive the Corps contract for the Cotton Meade Cap-Out project. The complaint then recites various alleged improprieties that occurred in connection with the project and concludes that, as a result, Keeler suffered actual damage on account of the discriminatory conduct of the Vicksburg Corps of Engineers in violation of 42 U.S.C. §§ 1981 and 2000d. Keeler seeks recovery of damages in an amount to be determined by the court.

After the case was transferred, the defendants moved to dismiss for lack of subject matter jurisdiction and to stay discovery pending resolution of that motion. On April 2, 1992, after the motions were argued to the district court, Keeler filed

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[2] We briefly recount the allegations pertinent to Count VI, but note that a more through account is set forth in ***Enplanar Co., Inc. v. Marsh***, 11 F.3d 1284 (5th Cir. 1994).

a Second Amended Complaint. On November 4, 1992, the district court granted the motion to dismiss and also denied leave to file the Second Amended Complaint, noting that no motion for leave to amend had been filed. The district court's final order was entered on August 6, 1993; and Keeler thereafter moved for reconsideration, which motion was denied.

II.

A.

Keeler asserts first that the district court improperly dismissed Count VI for lack of subject matter jurisdiction. Count VI is a claim for monetary damages against the Vicksburg Corps and the Corps of Engineers, both of which are subdivisions of the United States. ***Enplanar***, 11 F.3d at 1294 n.12. Keeler's claims can therefore only "proceed in the forum and manner allowed by the sovereign for that purpose." ***Simanonok v. Simanonok***, 918 F.2d 947, 950 (Fed. Cir. 1990). Here, the forum is prescribed by the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491(a), which "vests concurrent jurisdiction in the Claims Court and the federal district court over any `claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States.'" ***Amoco Production Co. v. Hodel***, 815 F.2d 352, 358 (5th Cir. 1987) (footnote omitted). But, the Court of Claims has exclusive jurisdiction if the claim exceeds $10,000. 28 U.S.C. § 1491(a)(1); ***Amoco***, 815 F.2d at 358.

Therefore, the district court properly held that it lacked subject matter jurisdiction if "(1) the action is against the United States; (2) the action is founded upon the Constitution, federal statute, executive regulation, or government contract; and (3) the action seeks monetary relief in excess of $10,000." ***Amoco***, 815 F.2d at 359.

Keeler's action is clearly against the United States. ***See Enplanar***, 11 F.3d at 1294 n.12 (Vicksburg Corp and Corps of Engineers are subdivisions of United States). Further, according to the express language of Count VI, the action is founded upon federal statutes, 42 U.S.C. §§ 1981 & 2000d. Finally, the action seeks an unspecified amount of monetary damages, thus rendering it fatally defective.[3] ***See Sheehan v. Army & Air Force Exchange Service***, 619 F.2d 1132, 1137 n.7 (5th Cir. 1980), ***rev'd on other grounds***, 456 U.S. 728 (1982).[4]

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[3] This defect was brought to the attention of Keeler by the defendants as well as by the district court, but Keeler made no attempt to amend. Indeed, the district court noted that it had specifically requested Keeler's counsel to explain how its request for monetary damages was consistent with the jurisdictional requirements of the Tucker Act, and that counsel failed to provide any satisfactory response. Accordingly, we are neither compelled nor inclined to allow Keeler yet another opportunity to correct its pleadings at this point.

[4] Keeler appears to argue that the district court should have exercised jurisdiction because the Court of Claims will likely not have jurisdiction over all of the plaintiffs' claims. This argument misses two points. First, the only claim before this Court is Count VI, not other claims Keeler might desire to assert. Second, regardless of the substance of Keeler's other claims, or the desirability of trying them in one forum, this court is without authority to expand the jurisdiction of the district court or to waive sovereign immunity, both of which would be necessary to allow Keeler to pursue Count VI in the district court.

Keeler's assertions that the district court had jurisdiction under other statutory provisions are without merit. 15 U.S.C. § 634(b) provides jurisdiction for claims against the Small Business Administration, an entity which is not a defendant here. The jurisdictional provision of the Administration Procedures Act, 5 U.S.C. § 702, also does not provide a jurisdictional base, because Count VI alleges no claims under that Act. In any event, § 702 jurisdiction is limited to claims "seeking relief other than money damages" and is not available for claims for monetary damages such as Count VI.[5]

For these reasons, the district court properly granted the defendants' motion to dismiss for lack of subject matter jurisdiction.

B.

Keeler contends next that the district court erred in refusing it additional discovery before ruling on the motion to dismiss.[6] As we recently held in a related context, a party against whom a motion for summary judgment has been filed may be entitled to

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[5] Keeler asserts in its reply brief that we should consider the attack on subject matter jurisdiction in light of the allegations contained in the Second Amended Complaint. The district court, however, dismissed the complaint based on the only claim that was before it, Count VI, and that is the dismissal that we review on appeal, particularly in light of our affirmance of the district court's denial of leave to amend the complaint, discussed *infra*.

[6] It is not clear from the record that the district court did anything that prevented Keeler from taking discovery. The defendants moved to stay discovery pending resolution of the motion to dismiss and Keeler opposed that motion, but the court never ruled on the discovery motion until it granted the dismissal. Therefore, the district court did not prevent Keeler from taking discovery.

additional discovery if they "(i) requested extended discovery prior to the court's ruling on summary judgment; (ii) placed the district court on notice that further discovery pertaining to the summary judgment motion was being sought; and (iii) demonstrated to the district court with reasonable specificity how the requested discovery pertained to the pending motion." ***Enplanar, Inc. v. Marsh***, 11 F.3d 1284, 1291 (5th Cir. 1994). Keeler fails this test, because it never identified any specific discovery needed to respond to the motion to dismiss.[7] At best, Keeler makes only vague and conclusory assertions that it is entitled to discovery. Accordingly, the district court did not abuse its discretion in declining to grant additional discovery.

C.

Finally, Keeler maintains that the district court erred by not granting leave to amend its complaint.[8] Again, Keeler's contention consists of vague and conclusory assertions that it should have been allowed to amend. In the end, it reduces to this: because amendments should be freely granted, the amendment should be granted.

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[7] Inasmuch as we affirm the motion to dismiss based on Keeler's failure to specify that it sought less than $10,000 in monetary damages, we fail to see how any discovery response could have assisted Keeler in opposing the motion.

[8] The district court stated in its November 4, 1992, order that Keeler had never filed a motion to amend, but instead had simply filed the second amended complaint. Keeler asserts on appeal that the motion was sent to the clerk's office but was "inexplicably not placed in the record." Keeler, however, never attempted to correct this defect in the record by filing a new motion to amend.

We review a district court's denial of a motion for abuse of discretion. "While `leave shall be freely given when justice so requires,' the decision rests in the sound discretion of the trial court." ***Ross v. Houston Independent School District***, 699 F.2d 218, 228 (5th Cir. 1983). Keeler never filed a motion to amend and has never asserted specific reasons why "justice ... requires" that the amendment be allowed. It is significant that the case before us now is merely Count VI of Keeler's complaint and that the remaining counts were resolved in the Eastern District of Louisiana and on appeal to this court. The Second Amended Complaint that Keeler sought to file, however, attempted to re-state not only Count VI, but also the other counts, at a time when nearly identical claims were pending in another district court (and then on appeal to this court) in a case between the same parties.[9] If Keeler had been allowed to amend, it would have been pursuing essentially the same claims in two courts at one time, an untenable result. Under these circumstances, we cannot say that the district court abused its discretion in denying the request to file the Second Amended Complaint.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[9] Keeler's motion to supplement the record with the record from that court is **DENIED**.