

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50039  
Conference Calendar

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JAMES B. MITCHELL,

Plaintiff-Appellant,

versus

U.S. CUSTOMS SERVICE  
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. SA-93-CV-980  
- - - - -

(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

James B. Mitchell appeals the dismissal of his action brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). State law determines the limitations period for Bivens actions. Spina v. Aaron, 821 F.2d 1126, 1128-29 (5th Cir. 1987). The applicable Texas limitations period is two years. Wightman v. St. John's Hospital and Health Center, Inc., No. 92-1749, 5-6 (5th Cir. Jun. 8, 1993)(unpublished; copy attached); Burrell v.

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Newsome, 883 F.2d 416, 418 (5th Cir. 1989). Federal law determines when a Bivens action accrues for the purpose of applying the statute of limitations. See United Klans of America v. McGovern, 621 F.2d 152, 153 n. 1 (5th Cir. 1980). "Under federal law, a cause of action accrues the moment the plaintiff knows or has reason to know of the injury," Helton v. Clements, 832 F.2d 332, 334 (5th Cir. 1987), or when "the plaintiff is in possession of the `critical facts' that he has been hurt and the defendant is involved." Freeze v. Griffith, 849 F.2d 172, 175 (5th Cir. 1988)(quoting Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980)). Federal courts borrow tolling provisions from state law. See Gaspard v. U.S., 713 F.2d 1097, 1102-03 n. 11 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); Burrell, 883 F.2d at 418.

Mitchell knew in January 1989 that his money had been taken. He allegedly was told around April 1, 1989, that his money had been forfeited and that he could not get it back. Absent tolling, the limitations period began in early 1989.

A Texas plaintiff may raise the affirmative defense of fraudulent concealment to defeat a limitations defense. To establish fraudulent concealment, "the plaintiff must show: (1) existence of the underlying tort; (2) the defendant's knowledge of the tort; (3) the defendant's use of deception to conceal the tort; and (4) the plaintiff's reasonable reliance on the deception." Arabian Shield Development Co. v. Hunt, 808 S.W.2d 577, 584 (Tex. Ct. App. 1991). Mitchell's contention that Agent Weimers and his own attorney somehow concealed from him the

1990 forfeiture by telling him in 1989 that the forfeiture had taken place is unconvincing. Indeed, the alleged statements of Weimers and Mitchell's attorney should have alerted Mitchell that the Customs Service did not intend to return Mitchell's money. Because Mitchell's tolling contention is unavailing, the limitations period commenced in early 1989 and ended in early 1991, more than two years before Mitchell filed his complaint.

The dismissal of Mitchell's complaint with prejudice was appropriate. Dismissal of an IFP complaint with prejudice is appropriate "[f]or example, if it is clear from the face of the complaint that the claims asserted are subject to an obvious meritorious defense, such as a peremptory time bar[.]" Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993).

AFFIRMED.