IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WILLIAM H. PAYNE

Plaintiff,

vs. CIVIL NO. 97-00266 SEC/DJS

NATIONAL SECURITY AGENCY

Defendant

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO VOID JUDGMENT FOR LACK OF JURISDICTION DIRECTED TO DISTRICT OF NEW MEXICO, SANTA FE CHIEF JUDGE MARTHA VAZQUEZ

Defendant National Security Agency[1] opposes Plaintiffs'[2] Motion to Void Judgment for Lack of Jurisdiction Directed To District Of New Mexico, Santa Fe Chief Judge Martha Vázquez, hereinafter referred to as "Plaintiffs' Motion."[3] Plaintiff contends that the Summary Judgment entered in this case is void for lack of jurisdiction because he paid the filing fee and demanded a trial by jury. Plaintiff previously raised this same issue and it was denied by Judge Santiago Campos in his Memorandum Opinion and Order dated February 17, 1999 [Doc. No. 57] and his Memorandum Opinion and Order

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[1] On April 30, 1998, Judge Campos entered a Memorandum, Opinion and Order holding, sua sponte, that the Defendant is the National Security Agency, and not Lt. Gen. Kenneth A. Minihan and further captions for the case should reflect this change.

[2] As a preliminary note, Plaintiff Morales was dismissed as a plaintiff from this action by order of the Court dated April 30, 1998, docket no. 42 .

[3] On August 18, 2004, United States District Judge William F. Downes entered an Order Granting Injunctive Relief in United States District Court for the District of New Mexico Civ. No. 01-634 WFD/DJS. The Order enjoined Plaintiff from filing any further actions without complying with the procedures set out by the Court.

dated December 23, 1999 [Doc. No. 77] and, as such, constitutes law of the case. Plaintiffs' Motion should be denied.

STATEMENT OF THE CASE

This lawsuit was filed on February 28, 1997 under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, relating to a request for documents which William H. Payne made upon the National Security Agency. As reflected on the Civil Docket Sheet for this case, the following pleadings are relevant to the instant motion:

1. Plaintiffs filed their first motion for summary judgment on June 4, 1997 [Doc. No. 11] to which Defendant responded on June 19, 1997 [Doc. No. 17] and Plaintiffs replied on July 8, 1997 [Doc. No. 20].

2. Defendant filed its motion for partial dismissal and for summary judgment on October 3, 1997 [Doc. No. 23], to which Plaintiffs responded on October 31, 1997 [Doc. No. 30]. Defendant filed its reply on November 14, 1997 [Doc. No. 32] and Plaintiffs filed an answer (surreply) on November 28, 1997 [Doc. No. 33].

3. Plaintiffs filed their second motion for summary judgment on December 22, 1997 [Doc. No. 34], to which Defendant responded on January 5, 1998 [Doc. No. 35] and Plaintiffs replied on January 20, 1998 [Doc. No. 36].

4. On April 30, 1998, Judge Campos entered a Memorandum Opinion and Order denying as moot Plaintiffs' motion for summary judgment, denying Defendant's motion for partial dismissal and staying Defendant's motion for summary judgment pending an

in camera review of a declaration to be provided to the Court[4], and denying without prejudice Plaintiffs' motion for summary judgment [Doc. No. 42].

5. Plaintiffs filed a motion to amend the memorandum opinion and order [Doc. No. 43], which was denied by the Court on May 21, 1998 [Doc. No. 44.] On May 28, 1998, Plaintiff Payne filed another motion to amend the Memorandum Opinion and Order which was denied on February 17, 1999 [Doc. No. 57.]

6. Plaintiffs filed a Notice of Interlocutory Appeal on June 9, 1998 [Doc. Nos 46, 47]. The appeal was dismissed by the United States Court of Appeals for the Tenth Circuit for lack of jurisdiction on December 17, 1998 [Doc. No. 52].

7. On October 27, 1999, Judge Campos entered a Memorandum Opinion and Order granting Defendant's motion for summary judgment, dismissing the case, [Doc. No. 72], and entered Summary Judgment [Doc. No. 73].

8. On November 9, 1999, Plaintiff filed a motion to alter and amend the Memorandum Opinion and Order [Doc. No. 74], to which Defendant filed a response [Doc. No. 75], and Plaintiff filed a reply [Doc. No. 76].

9. On December 23, 1999, Judge Campos entered a Memorandum Opinion and Order denying the motion to alter and amend [Doc. No. 77].

10. Plaintiff filed a Notice of Appeal with the United States Court of Appeals for the Tenth Circuit on January 3, 2000. [Doc. No. 78]. The Court of Appeals affirmed the decision of the District Court on December 13, 2000 [Doc. No. 80].

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[4] The FOIA specifically authorizes in camera examination of documents. 5 U.S.C. § 552(a)(4)(B) (2000); S. Conf. Rep. No. 93-1200 at 9 (1974).

ARGUMENT

Plaintiff William H. Payne asserts that because he paid a filing fee of $150 on February 28, 1997 and requested a jury trial, Judge Santiago Campos lacked jurisdiction to grant Defendant's motion for summary judgment. First, there is no right to a jury trial under the Freedom of Information Act. Second, the granting of summary judgment was entirely appropriate in this case. Third, Plaintiff has previously made this same assertion in this Court, *i.e.*, that he has a right to a jury trial under the Seventh Amendment of the United States Constitution and under Federal Rule of Civil Procedure 38 [Doc. Nos. 44, 45, 76]. This argument was specifically addressed and rejected by this Court [Doc. No. 57]. Plaintiff argued the right to a jury trial again in his reply [Doc. No. 76] which the Court again rejected in its Memorandum Opinion and Order entered on December 23, 1999 [Doc. No. 77]. Under the law of the case, this issue should not be relitigated.

I. No Right To Jury Trial In FOIA Action

Plaintiff contends that because he paid a filing fee of $150 and demanded a jury trial in this lawsuit, Judge Campos lacked jurisdiction to dismiss the lawsuit. Plaintiff has previously raised a similar, if not identical argument in this case. On May 21, 1998, Plaintiff Payne filed a motion to amend the Memorandum Opinion and Order entered April 30, 1998 [Doc. No. 45]. In his motion, Plaintiff asserted that he had a right to a jury trial under the Seventh Amendment of the United States Constitution and under Federal Rule of Civil Procedure 38 and alleged that the Court violated Plaintiff's rights to a jury

trial. In his Memorandum Opinion and Order dated February 17, 1999 [Doc. No. 57] at page 5, Judge Campos addressed this issue.

As Judge Campos succinctly stated:

> There is no right to a jury trial in a statutory cause of action against the federal government unless the relevant statute explicitly and unambiguously provides such a right. See Lehman v. Nakshian, 453 U.S. 156, 16-62, 168 (1981); see also Johnson v. Hospital of Med. College of Pa., 826 F. Supp. 942, 942, 945 (E.D. Pa. 1993). Congress did not explicitly provide for right to jury trial in FOIA. See 5 U.S.C. § 552.

While summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved, in the event of a trial on a contested issue of fact, it will be decided by a judge alone because the FOIA does not provide for a jury trial. Office of Information and Privacy, U. S. Department of Justice, Freedom of Information Act & Privacy Act Overview, 804 (May 2004 ed.). Thus, Plaintiff was not entitled to a jury trial in this action.

II. Summary Judgment Was Appropriate

As Judge Campos held, there is no Seventh Amendment jury trial right where no genuine issue of material fact exists because the court may, without violating Seventh Amendment rights, grant summary judgment pursuant to Fed. R. Civ. P. 56. Memorandum Opinion and Order at 6, [Doc. No. 57], citing Shore v. Parklane Hosiery Co., Inc., 565 F.2d 815, 819 (2d Cir. 1977) (citation omitted), aff'd, Parklane Hosiery Co. Inc. v. Shore, 439 U. S. 322 (1979). See Murphy v. Derwinski, 990 F.2d 540, 544 (10th Cir. 1993)(citing Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U. S. 317, 322-23 (1986)). It is beyond question that a district court may grant summary judgment where the material facts concerning a claim cannot reasonably be disputed. Even though this

technically prevents the parties from having a jury rule upon those facts, there is no need to go forward with a jury trial, (assuming a jury trial is even permitted under the appropriate statute, which, as stated *supra*, is not permitted under FOIA), when the pertinent facts are obvious and indisputable from the record; the only remaining truly debatable matters are legal questions that a court is competent to address. Garvie v. City of Fort Walton Beach, Florida, 366 F.3d 1186 (11th Cir. 2004).

Further, a Seventh Amendment right to trial is not violated because no such right exists if a party fails to make a Rule 56-required demonstration that some dispute of material fact exists which a trial could resolve. Conboy v. Edward D. Jones Co., 2005 WL 1515479 (5th Cir. 2005). Without a genuine issue for trial, there can be no demand for a jury trial. See Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 250 (1986)(summary judgment inquiry is threshold determination "whether there is the need for a trial."); DeYoung v. Lorentz, No. 95-3153, 69 F.3d 547, 1995 WL 662087 at *2 n.5 (10th Cir. Nov. 9, 1995) (unpublished disposition) ("[A] properly applied summary judgment procedure does not violate the Seventh Amendment.") Plaintiff in this case did not establish that a dispute of material fact existed nor was there a genuine issue for trial.

Finally, as Judge Campos noted, and the record clearly reflects, "Plaintiff cannot complain about the possible resolution of this case on Defendant's motion for summary judgment when [Plaintiff] himself has filed two motions for summary judgment in this case." Memorandum Opinion and Order, at 7 [Doc. No. 57]. Judge Campos' holding in 1999 that the Seventh Amendment and Fed. R. Civ. P. 38 do not apply to Plaintiff's lawsuit and Plaintiff has no right to a jury trial is an appropriate finding and should not be

set aside. Based upon the findings of this Court, the granting of summary judgment was entirely appropriate.

<u>III. Law Of The Case</u>

"'[T]he law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" <u>McIlravy v. Kerr-McGee Coal Corp.</u>, 204 F.3d 1031, 1034 (10th Cir. 2000) (quoting <u>United States v. Monsisvais</u>, 946 F.2d 114, 115 (10th Cir. 1991)). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." <u>Kennedy v. Lubar</u>, 273 F.3d 1293, 1298 (10th Cir. 2001) (quoting 18 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 4478, at 788 (1981)).

Although Plaintiff has requested that the judgment in Civ. No. 97-266 SC/DJS be voided as opposed to reconsidered, law of the case would still apply. Because this Court has already issued decisions determining that the Seventh Amendment and Fed. R. Civ. P. 38 did not apply to Plaintiff's lawsuit and that Plaintiff had no right to a jury trial, [Doc. Nos. 57, 77], the doctrine of law of the case governs. The Tenth Circuit has "routinely recognized that the law of the case doctrine is 'discretionary, not mandatory,' and that the rule 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power.'" <u>Stifel, Nicolaus & co., v. Woolsey & Co.</u>, 81 F.3d 1540, 1544 (10th Cir. 1996) (quoting <u>Messenger v. Anderson</u>, 225 U.S. 436, 444 (1912).

However, even though the doctrine of law of the case is discretionary in nature and not absolute, there are limitations on when a Court should depart from the doctrine.

The Tenth Circuit has determined that there are "three exceptionally narrow circumstances" when it will depart from the law of the case doctrine which are: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." United States v. Alvarez, 142 F.3d 1243, 1247 (10th Cir. 1998), cert. denied, 525 U.S. 905 (1998). In this case, none of the three narrow exceptions apply. As to the first exception, there has not been a trial on this matter wherein new evidence would alter the Court's decision. The second exception is equally inapplicable in that there has not been any new case law on the matter. Regarding the third exception, there is absolutely no indication that the Court's decision was "clearly erroneous and would work a manifest injustice" nor that the Court lacked jurisdiction in the first place.

"[T]here is a natural and healthy reluctance not to reconsider the decision (or, in this case, void the decision) unless powerful reasons are given for doing so. Otherwise parties would have an incentive constantly to pester judges with requests for reconsideration." Johnson v. Burken, 930 F.2d 1202, 1207 (7th Cir. 1991). The fact that Plaintiff is not happy with the results of this case nearly seven years after the United States Court of Appeals for the Tenth Circuit affirmed the District Court's decision does not constitute "manifest injustice," does not establish that this Court lacked jurisdiction to render a decision and certainly does not warrant reopening this case. Thus, this Court's holding pertaining to Plaintiff's right to a jury trial must stand and Plaintiff's motion to void the judgment entered herein must fail.

CONCLUSION

This Court had jurisdiction over the above-captioned case and summary judgment was appropriately entered. For the reasons stated above, Plaintiffs' Motion should be denied.

Respectfully submitted,

LARRY GOMEZ
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Electronically filed 5/29/07
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I HEREBY CERTIFY that on May 29, 2007, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

AND I FURTHER CERTIFY that on such date I served the foregoing pleading on the following non-EM/ECF Participant via first class mail, postage prepaid addressed as follows:

William H. Payne
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Albuquerque, NM 87111

/s
JAN ELIZABETH MITCHELL

N:\JMitchell\Payne\response in opposition.wpd