

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
7:26 PM 7/26/02
CLERK

ELOUISE PEPION COBELL, et al.,)
)
Plaintiffs,)
)
v.)
)
GALE A. NORTON, Secretary of the)
Interior, et al.,)
)
Defendants.)
_____)

Case No. 1:96CV01285
(Judge Lamberth)

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
TO STRIKE DEFENDANTS' MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES**

Defendants state the following as their opposition to Plaintiffs' Motion to Strike Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches ("Plaintiffs' Motion to Strike").¹

Introduction

The Court's order of September 17, 2002, which set the pertinent schedule for the case, states (at 3, ¶ 6), "the parties shall file any motions for summary judgment with respect to the Phase 1.5 trial no later than January 31, 2003." (Emphasis added). Plaintiffs' Motion to Strike does not allege that Defendants did not file papers on time but, rather, Plaintiffs seek to strike the Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches based upon Plaintiffs' attorney's assertion in a declaration (at 2) that it was not "served" upon them until "after 12:00 midnight." (Emphasis in original). Although Plaintiffs do not specify

¹ Plaintiffs' Motion to Strike was combined with Plaintiffs' opposition to Defendants' motion to strike four of Plaintiffs' papers that were filed days late.

precisely how long "after midnight" they claim they were served, presumably they contend it was just seconds, moments, or minutes later. It is unfortunate that Plaintiffs choose to burden the Court with so small a dispute. Nonetheless, because Plaintiffs seek the drastic remedy of striking a motion involving a crucial jurisdictional issue, Defendants must respond.

Plaintiffs' Motion to Strike should be denied because the subject papers were timely filed, timely served, and even if Plaintiffs were correct that the papers were served just after midnight, that would not justify striking so important a motion.

Argument

I. Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches, and Supporting Papers, Were Timely Filed and Served

The Court's September 17, 2002 Order required motions for summary judgment regarding the Phase 1.5 trial to be filed no later than January 31, 2003. Defendants filed their Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches, along with a supporting memorandum, a statement of material facts, and an appendix of exhibits, on that date.² Some of the papers were filed by 4:00 p.m. by handing them to personnel in the office of the clerk of

² However, as noted in Defendants' Motion for Leave to File Corrected Version of Brief, filed January 31, 2003, Defendants filed their Memorandum of Points and Authorities in Support of their Motion for Partial Summary Judgment by 4:00 p.m. on Friday, January 31, but, later that evening noticed some inadvertent, typographical errors in that brief. Defendants filed an errata sheet listing the needed corrections (attached to Defendants' Motion for Leave to File Corrected Version of Brief) on January 31. Thus, all of the corrections were filed and of record on January 31. Defendants also prepared a corrected brief (incorporating the corrections noted on the errata sheet), but because it had to be filed under seal (and the office of the clerk of court already was closed) that corrected brief could not be submitted to the Court until the next business day, Monday, February 3, 2003. However, the corrected brief was served upon Plaintiffs' counsel with the other papers pertaining to the Motion for Partial Summary Judgment on January 31, as indicated above.

court, while other of the papers were filed by placing them in the clerk's night-time drop box. Both methods constitute proper filing. See Williams v. Todman, 367 F.2d 1009, 1012 (3d Cir. 1966) (filing a petition "ordinarily means lodging it in the clerk's office"); In re Bryan, 261 B.R. 240, 244 (B.A.P. 9th Cir. 2001) (filing occurs when papers are deposited in the clerk's "drop box"). Plaintiffs' Motion to Strike does not allege that the papers were not filed on time.

In addition to being filed on January 31, 2003, the papers also were served on Plaintiffs' attorney, Keith Harper, on that date.³ Attached hereto is the declaration of John O'Connor, one of the personnel who hand-delivered the papers to Mr. Harper. Mr. O'Connor states that the motion papers were hand-delivered to Mr. Harper by 11:58 p.m. on January 31. Although late in the day, that still constitutes effective service on January 31.⁴ Service upon one of Plaintiffs' attorneys constitutes effective service on the Plaintiffs. See Buchanan v. Sherrill, 51 F.3d 227, 228 (10th Cir. 1995) (per curiam) (service is sufficient under Fed.R.Civ.P. 5 so long as at least one of a party's attorneys is served); Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1063 (5th Cir. 1990) (same). Thus, Plaintiffs are mistaken in asserting, in Mr. Harper's declaration, that the papers were not served until "after midnight."

³ In retracing the steps involved in serving the subject papers, Defendants have discovered some unrelated minor errors in the certificates of service of the papers pertaining to the Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches. None of these errors diminishes the effectiveness of service upon Plaintiffs (which was completed by the hand-delivery to Mr. Harper by 11:58 p.m. on January 31, as discussed above), but Defendants nevertheless wish to correct these errors so that the record will be accurate, and, therefore, Defendants are simultaneously filing Amended Certificates of Service regarding such papers.

⁴ Last-minute filing and service is an unfortunate by-product of the sheer volume of papers involved in the several motions for summary judgment filed on January 31. Mr. O'Connor's declaration indicates that Defendants tried to serve the papers earlier on other of Plaintiffs' counsel (Messrs. Brown or Gingold), but they apparently already had left their offices.

II. Even if the Papers Had Been Served Just After Midnight, That Would Not Justify Striking Them

Mr. Harper's affidavit (at 2) states that Defendants served the papers "after 12:00 midnight" (emphasis in original). The fact that he does not state a specific time most likely is because, even by his account (which Defendants dispute), it would only have been seconds, moments or minutes after midnight, which would be too thin a basis upon which to seek to strike the papers. Even if he were correct that the papers were handed to him a few minutes after midnight, that would hardly justify striking so important a motion.

Statutes of limitations on actions against the United States are jurisdictional. See Cobell v. Babbitt, 30 F. Supp. 2d 24, 43 n.21 (D.D.C. 1998) (citing Spannaus v. United States Dep't of Justice, 814 F.2d 52, 55 (D.C. Cir. 1987)). Jurisdictional defenses should not be precluded based upon allegations that the papers asserting such defenses were served seconds or minutes (not even days) late. Nor can Plaintiffs show any prejudice to them. Mr. Harper apparently acknowledges that he was present and actually received the papers when they were delivered, and even if he were correct that this occurred shortly after (rather than just before) midnight, Plaintiffs were no worse off as a result. At most, the only relief that could be warranted would be to calculate the time period for Plaintiffs' opposition brief starting from February 1 rather than January 31.

Nor does Plaintiffs' Motion to Strike gain any force by Plaintiffs' effort to analogize it to Defendants' motion to strike four of Plaintiffs' late papers. The circumstances are wholly different. Defendants' motion seeks to strike Plaintiffs' papers that were late not only in service, but also in filing with the Court, and which were late not by seconds or minutes, but by days.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs'

Motion to Strike.

Dated: February 26, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel
DAVID J. GOTTESMAN
JOHN R. KRESSE
Trial Attorneys
D.C. Bar No. 430094
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 GALE NORTON, Secretary of the Interior,)
 et al.,)
)
 Defendants.)
 _____)

Case No. 1:96CV01285
(Judge Lamberth)

ORDER DENYING PLAINTIFFS' MOTION TO STRIKE

This matter coming before the Court on Plaintiffs' Motion to Strike Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches, and any responses thereto, the Court finds that the motion to strike should be DENIED.

IT IS THEREFORE ORDERED that the said Plaintiffs' motion to strike is hereby denied.

SO ORDERED this _____ day of _____, 2003.

ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
202-822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
)
)
 Plaintiffs,)
)
)
 v.)
)
)
 GALE A. NORTON, Secretary of the)
 Interior, et al.,)
)
)
 Defendants.)

Case No. 1:96CV01285
(Judge Lamberth)

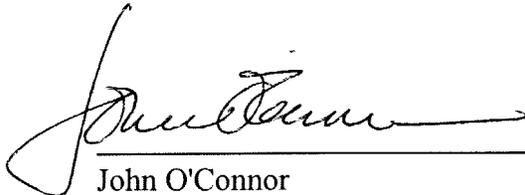
DECLARATION OF JOHN O'CONNOR

I, John O'Connor, under penalty of perjury, do hereby state as follows.

1. I am employed by Labat-Anderson, Inc. as the Project Manager working for the Department of Justice on the Cobell Litigation Support project. I am an attorney and a member of the D.C. Bar.
2. I have reviewed Plaintiffs' Motion to Strike Defendants' Motion for Partial Summary Judgment Regarding the Statute of Limitations and Laches, which states that the motion papers were served "after midnight" on February 1, 2003. In short, to the best of my knowledge, those papers were served by hand delivery to Plaintiffs' attorney Keith Harper on January 31, 2003, at 11:58 p.m., as explained in detail below.
3. On Friday, January 31, 2003, I left my office at 1110 Vermont Avenue, N.W. at approximately 11:40 p.m. to hand deliver copies of Defendants' Motion for Partial Summary Judgment Regarding the Statute of Limitations and Laches, both under-seal and redacted versions, to the offices of Plaintiffs' attorney Dennis Gingold at 1275 Pennsylvania Avenue, N.W. I understood that Defendants' attorney David Gottesman had informed Plaintiffs' attorneys earlier in the day that Defendants' summary judgment submissions were so voluminous that they could not be served by fax and would therefore be hand delivered. I was accompanied by Labat employees Shawn Gaines and Bob Pruitt. We had the documents with us when we left my office.

4. At approximately 11:44 p.m., while en route to Mr. Gingold's office, I received a cell phone call from Marcia McCarthy, another Labat employee, who was in the process of serving copies of other pleadings to Mr. Gingold and plaintiffs' attorney Keith Harper. Ms. McCarthy advised me that I should not continue my trip to Mr. Gingold's office since no one was answering the phone and she could not get access to his office to make the delivery. Rather, she informed me, I should proceed to Mr. Harper's office. I changed course and headed to Harper's office at 1714 N Street, N.W., which is in the opposite direction of Mr. Gingold's office. Ms. McCarthy called again while I was enroute to tell me that she had delivered her pleadings to Mr. Harper and that Mr. Harper was accepting service of Mr. Gingold's set as well.
5. We pulled up in front of Mr. Harper's building at approximately 11:56 p.m. I observed from my driver's seat that Mr. Harper was sitting in the entryway to his office. Mr. Pruitt and Mr. Gaines got out of my car, got the two boxes of pleadings (for Mr. Harper and Mr. Gingold) from the trunk of my car and hand delivered them to Mr. Harper. According to my watch, it was 11:58 p.m. when they delivered the two boxes.
6. When Mr. Pruitt and Mr. Gaines returned to the car, they told me that Mr. Harper had thanked them for the documents and acknowledged that the second box was for Mr. Gingold. They said nothing to me one way or the other about whether Mr. Harper had commented to them about the timeliness of the service. In preparing this declaration, I asked both Mr. Pruitt and Mr. Gaines whether Mr. Harper had said anything to them about the service, and they each separately answered that he had not.
7. I believe the times stated above were accurate because I regularly check my watch when I hear the time on the car radio.

26, I declare under penalty of perjury that the foregoing is true and correct. Executed on February 26, 2003.



John O'Connor

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 26, 2003 I served the foregoing *Interior Defendants' Opposition to Plaintiffs' Motion to Strike Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
13th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958



Kevin P. Kingston