

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CURTISS WILSON,

Plaintiff,

v.

JOHN OR JANE DOE, Director of the
Department of Licensing, HORTON'S
TOWING, a Washington Corporation, and
the UNITED STATES OF AMERICA.

Defendants.

CASE NO. 2:15-CV-0629-JCC

DEFENDANT UNITED STATES
OF AMERICA'S RESPONSE TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
CROSS-MOTION TO DISMISS
AND/OR FOR SUMMARY
JUDGMENT

Noted: April 4, 2016

Defendant United States of America ("United States"), by and through its counsel
Peter A. Winn of the United States Attorney's Office and Thomas B. Nedderman and John
A. Safarli of Floyd, Pflueger & Ringer, P.S., files this Response to Plaintiff Curtiss Wilson's
Motion for Summary Judgment and its Cross-Motion to Dismiss and/or for Summary
Judgment.

I. INTRODUCTION

Plaintiff's sole remaining claim against the United States is for conversion. Dkt. #49. On February 11, 2016, Plaintiff moved for summary judgment on the claim, erroneously arguing that based on the undisputed facts, the United States was liable as a matter of law. Dkt. #60 at p. 6. Plaintiff's case against the United States fails for three reasons.

First, as the Government noted in an earlier pleading, Plaintiff only can assert a claim against the United States under the Federal Tort Claims Act ("FTCA" or "Act"), but Plaintiff has failed to exhaust his administrative remedies by first filing his claims with the agency (in this case the Bureau of Indian Affairs ("BIA")), which is a precondition to the waiver of sovereign immunity under the Act. *See* Opposition to Plaintiff's Motion for Leave to Amend Complaint, pp. 6-7 (Dkt. # 26) ("Def's. Opp'n").

Second, Plaintiff's conversion claim is excluded from the scope of the FTCA by the Act's general exception for any claim "arising in respect of . . . the detention of any goods." *See* 28 U.S.C. § 2680.

Third, Plaintiff has failed to state a conversion claim under state tort law. The FTCA waives sovereign immunity for tort claims only to the extent that "a private person would be liable to the claimant in accordance with the law of [Washington State]." 28 U.S.C. § 1346(b)(1). Under the common law of Washington State, seizure of a vehicle pursuant to a facially valid Court Order does not fit the legal definition of the tort of conversion, which expressly requires that the seizure of property take place *without lawful process*.

II. STATEMENT OF UNDISPUTED FACTS

Pursuant to FRCP Rule 56(c), the United States incorporates by reference the declarations and all pleadings previously submitted by all the parties in this case, with emphasis, in particular, on the Declaration by Alexandra James (Dkt. # 27), submitted in the context of earlier proceedings in this case.

III. ARGUMENT AND AUTHORITIES

A. Plaintiff Failed to Exhaust His Administrative Remedies.

As noted earlier in this case, *see* Def's, Opp'n., at 6-7 (Dkt. # 26), Plaintiff has not exhausted his administrative remedies. The FTCA waives the United States' sovereign immunity for claims arising out of torts committed by federal employees, but requires the plaintiff first to have submitted his claim to the agency, and the claim to have been denied. 28 U.S.C. § 2675. Specifically Section 2675 provides that:

An action shall not be instituted upon a claim against the United States for ... injury or loss of property ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

Id.

The United States Attorney has certified that, with respect to the allegations in this case, Officer Brandon Gates is deemed to have been an employee of the BIA insofar as he was carrying out law enforcement duties for the Lummi Nation. After the United States was substituted in the place of Officer Gates, Dkt. #39 at p. 2, Plaintiff twice challenged the United States Attorney's certification of Officer Gates' scope of employment, and twice failed to overturn it. Dkt. #53, #55.

It is undisputed that Plaintiff Wilson has not presented the claims he is attempting to assert here to the Bureau of Indian Affairs. *See* James Decl. at ¶ 3. As Ms. James notes, an examination of all records of administrative claims filed with the BIA indicates no claim by Plaintiff. *Id.* The law is settled that when a claimant fails to exhaust administrative remedies prior to filing suit, the Court lacks jurisdiction to hear the case. *McNeil v. United States*, 508 U.S. 206 (1993); *Jerves v. United States*, 966 F.2d 517, 518 (9th Cir. 1992); *Caton v. United States*, 495 F.2d 635, 638 (9th Cir. 1974) (statutory procedure is clear that tort proceeding may not be commenced in court against the United States until claim conclusively denied or

lapse of six months without action). *See generally United States v. Kwai Fun Wong, et al.*, 135 S.Ct. 1625 (2015). Because Plaintiff has not exhausted his administrative remedies, pursuant to 28 U.S.C. § 2675, there has been no waiver of sovereign immunity under the FTCA. 28 U.S.C. § 2678. This case therefore must be dismissed for lack of jurisdiction.¹

B. The FTCA Precludes Plaintiff's Conversion Claim

Even if Plaintiff had exhausted his administrative remedies, his conversion claim is still barred by an exception to the FTCA for "[a]ny claim arising in respect of . . . the detention of any goods." 28 U.S.C. § 2680(c). Plaintiff alleges that in executing a Tribal Court's forfeiture Order, Gates took "possession" of Plaintiff's "truck", which "constitute[d] the toert [sic] of conversion." Dkt. #4-1 at 7. Claims arising out of the forfeiture of a vehicle come within this statutory bar. *See Hernandez v. United States*, 86 F.Supp.2d 331, 334-35 (S.D.N.Y. 2000). However, there is an exception to the exception. The statutory bar does not apply to detention-of-goods claims if Plaintiff can establish that his case meets each of the following four elements: (1) the property was "seized for the purpose of forfeiture under any provision of *Federal law*"; (2) "the interest of the claim was not forfeited"; (3) "*the interest of the claimant was not remitted or mitigated*"; and (4) "the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law then the waiver of sovereign immunity applies." 28 U.S.C. § 2680(c)(1)-(4) (emphasis added).

In this case Plaintiff's vehicle was not "seized for the purpose of forfeiture under any provision of *Federal law*"; to the contrary, Plaintiff alleges that Officer Gates seized his vehicle under a provision of the *Lummi Tribal Code* based on an order from the *Lummi Tribal Court*. Dkt. #4-1 at p. 6-7. Accordingly, Plaintiff fails to satisfy the first element of the federal-forfeiture exception to the FTCA's detention-of-goods exception. Plaintiff's case is also missing another required element of the federal-forfeiture exception because

¹ Plaintiff may present his claim to the BIA within 60 days after dismissal of this civil action. *See* 28 U.S.C. § 2679(d)(5).

1 Plaintiff's interest in his property was "remitted" to him. *See* Dkt. #60-1 at p. 3 (Plaintiff's
 2 declaration stating that his vehicle was returned to him after the seizure). In sum, Plaintiff
 3 fails to meet two of the four elements required to qualify for the federal-forfeiture exception
 4 to the FTCA's general detention-of-goods exception, so his conversion claim against the
 5 United States is barred by sovereign immunity.

6 **C. Plaintiff Cannot Fulfill the Elements of Conversion**

7 Finally, Plaintiff cannot satisfy the basic elements of a state conversion tort, which
 8 under Washington State law requires intentionally interfering of property without *lawful*
 9 *justification*. *See Judkins v. Sadler-MacNeil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962)
 10 (Conversion requires "the act of willfully interfering with any chattel, *without lawful*
 11 *justification*, whereby any person entitled thereto is deprived of the possession of it.")
 12 (emphasis added). *See also PUD of Lewis County v. WPPSS*, 104 Wn.2d 353, 378 (1985)
 13 ("willfully interfering with any chattel, *without lawful justification*, whereby any person
 14 entitled thereto is deprived of possession of it.") (emphasis added).

15 Here Defendant Horton's Towing released Plaintiff's vehicle to Gates after he
 16 presented an official Lummi Tribal Court Notice of Seizure, clearly referencing the seizure
 17 of Plaintiff's vehicle on the Lummi Reservation. Dkt. #4-1 at p. 9 (copy of Notice of Seizure
 18 and Intent to Institute Forfeiture). Plaintiff has presented nothing to indicate that at the time
 19 of the seizure, the Court Order *on its face* contained anything invalid about it. Accordingly,
 20 Plaintiff cannot establish Officer Gates is liable for the tort of conversion under Washington
 21 common law because the underlying seizure was based on an order that was *facially-valid*,
 22 providing immunity to Officer Gate from conversion claims such as these. While it is true
 23 that Plaintiff seeks to challenge the underlying jurisdiction of the Tribal Court that issued the
 24 seizure Order, the time and place for Plaintiff to have made such a challenge was when he
 25 appeared in Tribal Court to reclaim his vehicle. In fact, Plaintiff appears to have been
 26 successful in doing precisely this. But this does not make anything about the Tribal Court's
 27 Order *facially invalid*.

On Plaintiff's theory, any seizure pursuant to a court order followed by a successful litigation to reclaim the property would necessarily turn the original seizure into a conversion. But the essence of conversion is the seizure of a person's chattel *without due process*. Under the common law in Washington State, Gate's seizure of the vehicle was privileged as part of the very definition of the conversion tort. Plaintiff cannot satisfy the critical requirement of conversion under Washington common law, which requires a showing that the converted chattel be seized "without lawful justification." *Judkins*, 61 Wn.2d at 3. Precisely Because Gates relied on a facially-valid court order he acted *with* "lawful justification" in taking possession of the vehicle. The order of seizure provided Plaintiff with his remedy; Plaintiff availed himself of that remedy. He entered an appearance in the Lummi Tribal Court, and there he was able to reclaim possession of his vehicle.

Plaintiff can cite no case, whether in Washington State or any other jurisdiction, holding that the seizure of property pursuant to a facially-valid court order renders a law enforcement officer liable for the tort of conversion. Indeed, as Section 266 of the Restatement (Second) of Torts makes clear, "[o]ne is privileged to commit acts which would otherwise be a trespass to a chattel or a conversion when he acts pursuant to a court order *which is valid or fair on its face*." Restatement (Second) of Torts, § 266 (1965). The Restatement also notes the clear analogy with the tort of false arrest, where no action will lie against a constable, sheriff or other law enforcement officer who executes an arrest based on a warrant good on its face, but subsequently determined to be invalid. *See Williams v. Franzoni*, 217 F.2d 533, 534 (2nd Cir. 1954).

Section 266 of the Restatement has been repeatedly applied to preclude conversion claims in similar contexts. *See, e.g., Dexter v. Depository Trust & Clearing Corp.*, 406 F. Supp. 2d 260, 265 (S.D.N.Y. 2005) ("An act which would otherwise constitute conversion is privileged when it is committed pursuant to a court order valid on its face."); *Huebner v. Alliance Fund. Servs., Inc.*, No. 98-243, 1999 WL 314168 (D.N.J. May 3, 1999) (collecting cases and stating that it is "widely recognized that when a taking is authorized or directed by a court order, conversion will not result") In sum, the entire point of a conversion action is

1 that it must show lack of any “lawful justification.” *Judkins*, 61 Wn.2d at 3. In other words,
 2 the tort of conversion is at its essence a common law prohibition against *self-help*; and the
 3 express elements of the tort in Washington State make it clear that this tort simply does not
 4 encompass seizures of property pursuant to facially valid court orders. Since Plaintiff cannot
 5 establish the elements of the conversion tort under Washington State common law, his claim
 6 against the United States must be dismissed.

7 **IV. CONCLUSION**

8 For the reasons above, the United States respectfully requests that this Court deny
 9 Plaintiff’s summary judgment motion and grant the United States’ cross-motion to dismiss
 10 and/or for summary judgment.

11 DATED this 4th day of March, 2016.

12 Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on March 4, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on March 4, 2016 I mailed by United States Postal Service the foregoing document to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

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Dated this 4th day of March, 2016.

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