

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

JED MARGOLIN,

Plaintiff,

v.

Case No. 6:12-MC-00047-28DAB

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION,

Defendant.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S OBJECTION
TO PROPOSED FINDINGS AND RECOMMENDATIONS (#4)**

COMES NOW Defendant the National Aeronautics and Space Administration ("NASA") and submits this response to Plaintiff's Objection to the U.S. Magistrate Judge's Report and Recommendation and Order. ("Objection") (#4). Plaintiff's objection has no merit and his motion for writ of execution should be denied.

INTRODUCTION

Plaintiff seeks to execute a writ on NASA's assets to obtain \$107.99 in costs he claims to have incurred in moving to execute a writ to satisfy a \$525.06 judgment from the District of Nevada. Plaintiff has not identified a valid basis for subject matter jurisdiction, however, and he has failed to establish that NASA has waived its sovereign immunity from suit for writs of execution. Moreover, Plaintiff did not assert that claim before the U.S. Magistrate Judge. Thus, the U.S. Magistrate Judge never had an opportunity to consider that issue. Lastly, Plaintiff readily admits that the District of Nevada judgment has been satisfied and he offers no admissible evidence to establish

that he incurred \$107.99 in additional costs. Under the circumstances, Plaintiff is not entitled to relief. Accordingly, the motion for writ of execution should be denied.¹

BACKGROUND

On November 4, 2011, a District of Nevada judge entered a judgment for \$525.06 in costs against NASA in a Freedom of Information Act (“FOIA”) case Plaintiff filed in that district. (# 2-1 pp. 3-4). Plaintiff subsequently moved for a writ of execution against NASA in the Middle District of Florida, seeking to seize NASA’s assets in Florida to satisfy that judgment. (#2). Plaintiff argued that the writ was necessary because his efforts to secure payment of the judgment from NASA had gone unanswered. (#2 pp. 2-3).

The U.S. Magistrate Judge in the Middle District of Florida denied Plaintiff’s motion for writ of execution because: (1) Plaintiff failed to provide any authority that establishes the right to execute a writ of execution on a federal agency; and (2) costs assessments in FOIA cases are required to be paid “only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered.” (#4 p. 3). Pub. L. 110-175, 121 Stat. 2425 (2007). (#4 p. 3). In the U.S. Magistrate Judge’s view, nothing in the law allows for the payment of costs through a writ of execution of agency assets. (#4 p. 3).

Plaintiff now objects to the U.S. Magistrate Judge’s Report and Recommendation

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Plaintiff did not serve his Objection on NASA’s counsel, Assistant United States Attorney Holly A. Vance (#4 p. 4, lines 25-34), thereby delaying her receipt of his Objection. Under the circumstances, this Court should consider this response.

and Order. (“recommendation”) (#5). In his objection, Plaintiff acknowledges that, since the U.S. Magistrate Judge issued his recommendation, NASA paid the \$525.06 judgment. (#5 p. 10, line 4). As a result, Plaintiff no longer seeks to execute on that judgment. (# 5 p. 9, lines 8-12; p. 10, lines 8-16). Instead, he seeks to execute on \$107.99 in costs he claims to have incurred as a result of seeking the writ to satisfy the \$525.06 judgment. (# 5 p. 9, lines 8-12; p. 10, lines 8-16).

ARGUMENT

A. Plaintiff has failed to plead a valid basis for subject matter jurisdiction.

Federal courts are courts of limited jurisdiction and, until proven otherwise, a federal court is presumed to lack jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1944). Because a federal court is presumed to lack jurisdiction, a plaintiff bears the burden to establish the existence of jurisdiction. *Id.* Here, Plaintiff has failed to provide any authority that would allow the right to execute a writ against a federal agency. Moreover, costs assessments in FOIA cases are required to be paid “only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered.” Pub. L. 110-175, 121 Stat. 2425 (2007). Because subject matter jurisdiction is lacking in this case, the motion for writ of execution should be denied.

B. Plaintiff’s writ of execution is barred by the doctrine of sovereign immunity.

The United States and its agencies may not be sued without their consent. *Raulerson v. U.S.*, 786 F.2d 1090, 1091 (11th Cir. 1986); *Humphrey v. Napolitano*, 2011 WL 4527451 (S.D.Fla.). Any waiver of sovereign immunity must be explicit and will be

strictly construed. *Id.* Here, Plaintiff has failed to show that NASA has waived its sovereign immunity and consented to be sued via a writ of execution. Accordingly, the writ of execution should be denied, in accordance with the U.S. Magistrate Judge's recommendation.

C. Plaintiff did not argue before the U.S. Magistrate Judge that he is entitled to \$107.99 in costs. Therefore, this Court should not consider that argument.

Plaintiff seeks to execute a writ on NASA's assets to obtain \$107.99 in costs he claims to have incurred as a result of seeking the writ to satisfy the \$525.06 judgment. (# 5 p. 9, lines 8-12; p. 10, lines 8-16). Plaintiff, however, never raised that argument before the U.S. Magistrate Judge and thus the U.S. Magistrate Judge never had an opportunity to consider that issue. Under the circumstances, this Court should decline to consider Plaintiff's argument. *See Williams v. McNeil*, 557 F.3d 1287, 1290-91 (11th Cir. 2009) (“[A] district court judge does not abuse his discretion in either considering or refusing to consider an ‘argument that was not presented to the magistrate judge.’”).

D. The District of Nevada judgment for \$525.06 has been satisfied and Plaintiff offers no evidence that he incurred \$107.99 in additional costs.

Plaintiff readily admits that the \$525.06 judgment from the District of Nevada has been satisfied. (#5 p. 10, line 4). Under the circumstances, the issue addressed by the U.S. Magistrate Judge — whether Plaintiff is entitled to a writ of execution on NASA's assets to obtain \$525.06 in costs — is now moot. *See Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276, 1281 (11th Cir. 2004) (“A case is moot when the issue presented is no longer live, the parties lack a legally cognizable interest in its outcome, or a court decision could no longer provide meaningful relief to a party.”).

Moreover, Plaintiff offers no evidence to support his claim that he incurred an additional \$107.99 in costs. See *Legg v. Wyeth*, 428 F.3d 1317, 1323 (11th Cir. 2005) (“the court cannot then resolve the facts in the Plaintiffs’ favor based solely on the unsupported allegations in the Plaintiffs’ complaint”). Under the circumstances, Plaintiff’s motion to execute a writ on NASA’s assets to obtain \$107.99 in costs should be denied.

CONCLUSION

For the reasons argued above, this Court should deny the motion for writ of execution. (#4).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and mailed a copy of the foregoing by U.S. Mail, postage prepaid, to the following non-CM/ECF participant:

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/s/ Ralph E. Hopkins
RALPH E. HOPKINS
Assistant United States Attorney