

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Filed 9-13-2007
Clerk, U. S. District Court
Western District of Texas
By AP
Deputy

IN THE MATTER OF THE SEIZURE §
OF: CHECKING ACCOUNT §
NUMBERS 8069486 & 8074822, §
SAVINGS ACCOUNT NUMBERS 35001 §
& 155123 LOCATED AT §
GOVERNMENT EMPLOYEES §
CREDIT UNION OF EL PASO §
BEARING THE NAME OF FRANK B. §
APODACA, IN WHOLE OR IN PART, §
WHICH HE CAN ACCESS BY §
SIGNATURE OR OTHERWISE. §

SEIZURE WARRANT
CASE NO. EP-05-CR-182-FM

-and-

GECU,
Plaintiff,

CIVIL CAUSE NO.
EP-07-CA-181-FM

v.

UNITED STATES OF AMERICA and
FRANK B. APODACA,
Defendants.

ORDER ON EVIDENTIARY HEARING
OF AUGUST 31, 2007

Before the Court is Movant Frank B. Apodaca's ("Apodaca") "Motion for a 21 U.S.C. § 853(e) Hearing and to Return Property with Brief in Support" ("Motion"), filed through counsel in seizure warrant cause number EP-05-CR-182-FM on June 25, 2007. Therein, Apodaca seeks the return of certain funds held in his name by Government Employees Credit Union ("GECU").¹

Also before the Court is Plaintiff GECU's "Complaint for Interpleader and Declaratory Relief" ("Complaint"), filed on May 25, 2007, in civil cause number EP-07-CA-181-FM. In the Complaint, GECU incorrectly contends that both the Government and Apodaca assert their

¹ The Federal Bureau of Investigation ("FBI") seized the aforementioned funds on or about May 21, 2007, pursuant to a seizure warrant issued by this Court.

entitlement to the funds held in Certificate of Deposit account numbered 3500181 (“CD 3500181”). As shown below, what GECU really seeks is the return of funds it disbursed to both the Government and Apodaca in excess of the amount held in the account at issue.

In an effort to ascertain facts common to both Motions, the Court held an evidentiary hearing on August 31, 2007, and heard testimony from witnesses for GECU and the Government. The Court now summarizes the most significant aspects of the parties’ testimony.

I. Evidentiary Hearing Testimony

On May 21, 2007, at approximately five o’clock in the evening, FBI Special Agent Kay Lee Kennedy (“Kennedy”) served GECU’s Senior Vice President, Fermin Acosta (“Acosta”), with a seizure warrant issued by this Court. The seizure warrant listed four accounts on its face: checking account number 8069486 (“Checking 8069486”), checking account number 8074822 (“Checking 8074822”), savings account number 35001 (“Savings 35001”), and savings account number 155123 (“Savings 155123”). Upon serving the seizure warrant, Agent Kennedy informed Acosta that GECU should immediately freeze the accounts listed therein. In response, Acosta instructed Bernadette Ramos (“Ramos”), a GECU employee, to put a “file maintenance hold” on the four accounts specified in the seizure warrant. Thereafter, when Agent Kennedy requested tangible proof that GECU had frozen the accounts named in the seizure warrant, Acosta informed her that he could not comply with her request. Agent Kennedy then queried whether the accounts were actually frozen at that time. Acosta responded that they were not. Agent Kennedy told Acosta that she would not leave the premises until Acosta assured her that GECU had frozen the accounts.

Acosta asserts that he then walked to Ramos’s office and personally asked Ramos to close all GECU accounts under Apodaca’s name, in addition to the ones listed in the seizure

warrant, as a precautionary measure. Acosta then informed Agent Kennedy that GECU had frozen the accounts and would likely issue a check for the amount of frozen funds the next day. However, Acosta testified that due to GECU's inexperience with seizure warrants, his instructions to freeze all of Apodaca's accounts ultimately were not implemented.²

On May 22, 2007, Fred Morton ("Morton"), GECU's longstanding outside counsel, received a copy of the seizure warrant. Morton called Supervisory Special Agent Chris Clarke ("Clarke"), the FBI's Chief Division Counsel, to discuss the seizure warrant's scope. Morton also spoke with Rosa Sianez ("Sianez"), a FBI Paralegal Specialist, informing her that GECU reported approximately \$91,000 in all of the accounts held at GECU under Apodaca's name. Sianez then advised Agent Kennedy that GECU would issue a check for approximately \$91,000. Meanwhile, that same day, Apodaca requested and received from GECU a check for \$75,131.31 from CD 3500181 issued in the name of Ray Velarde ("Velarde"), Apodaca's attorney.

On May 23, 2007, after Acosta learned that GECU had issued a check to Velarde on May 22, 2007, from CD 3500181, Acosta called Morton to discuss whether or not the seizure warrant encompassed CD 3500181. Morton testified that he was unsure whether the seizure warrant encompassed CD 3500181, but he personally believed that CD 3500181 in some way related and was traceable to Savings 35001, which was listed in the seizure warrant.

When Agent Kennedy arrived at GECU on May 23, 2007, Acosta tendered a check to the U.S. Marshals Service in the amount of \$14,405.76. Although Agent Kennedy expressed her

² To the extent Acosta attempted to cast blame on Bernadette Ramos, another GECU employee, for GECU's failure to implement his instructions to freeze all of Apodaca's accounts held at GECU, the Court did not find his testimony credible. In contrast, the Court found Ramos's testimony that Acosta merely asked her to put a hold on the four account numbers listed on the seizure warrant's face to be a truthful and accurate rendition of events in question.

concern that the check was not for \$91,000, Acosta refused to provide any subsequent information. Later that day, when the FBI served Acosta with a grand jury subpoena, Acosta informed the FBI that GECU had issued a check for \$75,131.31 the previous day to Apodaca. After further hesitation, Acosta then ordered GECU staff to issue an additional check payable to the U.S. Marshals Service in the amount of \$75,936.53. In summary, GECU issued checks to both Apodaca and the FBI representing the funds held in CD 3500181. The amounts were not identical because GECU reduced the amount of Apodaca's check to reflect early withdrawal penalties.

II. Applicable Law

A. *Fourth Amendment*

The Fourth Amendment to the United States Constitution provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”³ The Fourth Amendment requires particularity in the warrant itself and not in the warrant's supporting documents.⁴ The particularity requirement is satisfied when the warrant “enable[s] the searcher to reasonably ascertain and identify the things which are authorized to be seized.”⁵

B. *Code of Federal Regulations, Title 12, Chapter VII, Section 707.2*

Title 12, Chapter VII, Section 707.2 of the Code of Federal Regulations defines the term “account” as “a share or deposit account at a credit union held by or offered to a member or

³ U.S. CONST. amend IV.

⁴ *Groh v. Ramirez*, 540 U.S. 551, 557 (2004).

⁵ *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981) (citing *Steele v. United States*, 267 U.S. 498, 503-04 (1925)).

potential member.”⁶ The definition encompasses accounts such as share, checking and term share accounts.⁷ A “term share account” is “any share certificate, interest-bearing *certificate of deposit* account, or other account . . . offered by a credit union to a member or potential member.”⁸

The Code of Federal Regulations identifies no credit union account deemed to be dependent on another account. According to the official staff interpretations of the National Credit Union Administration Rules and Regulations, Part 707, credit unions may use adjectives or trade names to describe accounts, so long as the synonym used is accurate and not misleading.⁹ For example, a credit union may describe an account as “Best Share Draft Account” or “Ultra Money Market Share Account.”¹⁰ Nonetheless, the Code of Federal Regulations neither mentions nor defines the term “trailer account,” which the banking industry uses to describe an account that is related and traceable to another account, and is not an independent account in and of itself.¹¹

C. *Texas Finance Code*

Under Section 91.002 of the Texas Finance Code, the term “deposit account” include “a savings account, *certificate of deposit*, withdrawable deposit, demand deposit account, [or]

⁶ 12 C.F.R. § 707.2 (2006).

⁷ *Id.*

⁸ *Id.* (emphasis added).

⁹ 12 C.F.R. Pt. 707, App. C.

¹⁰ *Id.*

¹¹ The Court’s definition of the term “trailer account” is based on Morton’s testimony at the August 31, 2007 evidentiary hearing. Though Morton’s testimony could possibly be construed as the banking industry’s common way to refer to Certificate of Deposit accounts, the regulatory scheme described in this order does not acknowledge that account relationship.

checking account . . .”¹² Section 125.003 of the Texas Finance Code further provides that a “deposit account” “consists of payments made under an agreement between the credit union and a depositor, including a draft account, checking account, savings account, *certificate of deposit*, individual development account, or other similar account or arrangement.”¹³

III. Discussion

A. *Probable Cause*

Before issuing the seizure warrant, the Court applied the Fourth Amendment’s probable cause requirements,¹⁴ to determine whether probable cause existed to issue the seizure warrant. The Court ascertained that probable cause did exist, based on an extensive and detailed supporting affidavit, which is still under seal. Upon further reviewing the sealed affidavit, it is apparent to the Court that probable cause existed to seize funds from the four accounts listed in the seizure warrant, as well as the funds encompassed in CD 3500181, which was not listed in the seizure warrant.¹⁵ However, the Court’s determination that probable cause existed to seize the funds in CD 35000181 does not end its inquiry.

B. *Specificity of the Warrant*

The seizure warrant failed to satisfy the Fourth Amendment’s specificity requirements¹⁶ as applied to CD 3500181. The Court finds no reasonable interpretation of the seizure warrant

¹² TEX. FINANCE CODE ANN. § 91.002 (Vernon 1988) (emphasis added).

¹³ *Id.* § 125.003 (Vernon’s 2006) (emphasis added).

¹⁴ *See* U.S. CONST. amend IV.

¹⁵ The Court also notes that, through Harriet May’s testimony, the Government established that the funds used to create CD 3500181 on February 22, 2007, came from accounts subject to the seizure warrant.

¹⁶ *See* U.S. CONST. amend IV.

accounts listed would have included the subject CD. While, according to Morton's testimony, CD 3500181 was a "trailer account" to Savings 35001, no such terminology (i.e. "trailer account") is found anywhere in the regulatory scheme of credit unions as it relates to Certificate of Deposit accounts. Further, GECU has not produced any internal guidelines or regulations in support of Morton's opinion. Thus, on its face, the seizure warrant violated the Fourth Amendment's specificity requirement because it did not adequately list or describe CD 3500181.

IV. Conclusion

Thus, as improbable as it may seem, Apodaca's withdrawal of funds from GECU on May 22, 2007, appears to have been nothing more than a simple coincidence. Moreover, even though the confusion surrounding the freezing of Apodaca's GECU accounts was caused by Acosta's surprising and rather disturbing lack of knowledge of banking regulations,¹⁷ the problem of the warrant's lack of specificity still remains. Although there was probable cause for the Government to seize the \$75,936.53 in CD 3500181, GECU did not have a duty to tender these funds to the Government because the seizure warrant did not specifically describe this account.

Therefore, the Government is **ORDERED** to **SHOW CAUSE** by September 24, 2007, why it should not be ordered to return \$75,936.53 to GECU, as said funds were incorrectly disbursed.

SIGNED this 13th day of September, 2007.



FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

¹⁷ Even more alarmingly, the evidence before the Court suggests that neither Acosta nor any other GECU employee even attempted to ascertain what banking regulations might be relevant to the situation.