UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
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ORDER

September 22, 2023

Before
ILANA DIAMOND ROVNER, *Circuit Judge*
AMY J. ST. EVE, *Circuit Judge*
DORIS L. PRYOR, *Circuit Judge*

No. 23-2661	GEORGE GAIO MANO, Plaintiff - Appellant v. JANET YELLEN, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:22-cv-01037-RLY-MJD Southern District of Indiana, Indianapolis Division District Judge Richard L. Young	

The following is before the court:

1. **MOTION FOR TEMPORARY INJUNCTION**, filed on September 13, 2023, by counsel for the pro se appellant.

2. **MOTION FOR LEAVE TO AMEND PRELIMINARY INJUNCTION**, filed on September 18, 2023, by the pro se appellant.

3. **MOTION FOR SUMMARY AFFIRMANCE AND OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION**, filed on September 20, 2023, by counsel for the USA,

IT IS ORDERED that Appellant George Gaio Mano's motion for a temporary injunction is **DENIED**, *see Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 763 (7th Cir. 2021), and that the Appellant's motion for leave to amend is **DENIED** as moot.

IT IS FURTHER ORDERED that the Appellee United States's motion for summary affirmance is **DENIED**. *See United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006).

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 15, 2024*
Decided May 6, 2024

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 23-2661

GEORGE GAIO MANO,
Plaintiff-Appellant,

v.

JANET YELLEN, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:22-cv-01037-RLY-MJD

Richard L. Young,
Judge.

ORDER

George Mano appeals the dismissal of his suit seeking to enjoin enforcement of a provision of the Bank Secrecy Act that requires U.S. citizens to report interests in certain foreign bank accounts. Because Mano fails to raise a claim arising under federal law and

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

lacks standing, we modify the district court's judgment to reflect that Mano's complaint is dismissed for lack of jurisdiction.

Congress enacted the Bank Secrecy Act to encourage tax compliance and facilitate criminal investigations by requiring U.S. citizens to report financial relationships and transactions with foreign banks. See 31 U.S.C. §§ 5311, 5314(a); *United States v. Xiao*, 77 F.4th 466, 469 (7th Cir. 2023). Any individual who has an interest in a foreign bank account with a balance that exceeded $10,000 at any point in the previous year must file a Report of Foreign Bank and Financial Accounts ("FBAR"). See 31 C.F.R. §§ 1010.306(c), 1010.350(a). In that filing, holders must disclose account balances, types, and numbers as well as the name and address of the financial institution. See Fin. Crimes Enf't Network, *FinCEN Form 114*. Failing to timely file an FBAR may result in civil and criminal liability. See 31 U.S.C. §§ 5321(a)(5), 5322(a).

Mano is a U.S. citizen who has lived in Japan since 2013. In 2022, his Japanese bank account balance exceeded $10,000, obligating him to file an FBAR within the next calendar year. Rather than file, Mano sued U.S. Treasury Secretary Janet Yellen, the Department of the Treasury, and the Internal Revenue Service, seeking to bar them from enforcing the FBAR filing requirement. Mano argued that the requirement constituted an unreasonable search and seizure under the Fourth Amendment, deprived him of due process in violation of the Fifth Amendment, infringed upon a right of privacy he claimed under the Ninth and Tenth Amendments, and violated the Fifth Amendment's privilege against self-incrimination.

The district court dismissed Mano's complaint for failure to state a claim. See FED. R. CIV. P. 12(b)(6). The court concluded that Mano's Fourth Amendment argument was foreclosed by *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 59–63 (1974), where the Supreme Court held that the Bank Secrecy Act's reporting requirements were not unreasonable searches. The district court further determined that Mano had not adequately developed his due process argument and failed to allege any violation of the privilege against self-incrimination. Finally, the court concluded that the Ninth and Tenth Amendments did not afford Mano any right to privacy. Mano appealed.

Before evaluating the substance of Mano's claims, we must first assure ourselves that our jurisdiction is proper. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998). This requires, among other things, that Mano "point to an underlying source of federal law that supplies [him] with a cause of action" to bring his claim in federal court. *Okere v. United States*, 983 F.3d 900, 902–03 (7th Cir. 2020); see also *Gunn v. Minton*, 568 U.S. 251, 257 (2013). He fails to do so.

The statute conferring jurisdiction over federal questions, 28 U.S.C. § 1331, does not itself supply a cause of action. And neither side asserts that the Bank Secrecy Act creates a privately enforceable claim. While Mano's suit implicates several constitutional amendments, "[c]onstitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." *DeVillier v. Texas*, 144 S. Ct. 938, 943 (2024). And Mano does not allege that this is one of the rare instances where the Constitution implies a cause of action. See *Egbert v. Boule*, 596 U.S. 482, 490–93 (2022).

The only plausible vehicle for Mano's claims is *Ex parte Young*, 209 U.S. 123 (1908), which permits a plaintiff to invoke the federal courts' ability to enjoin unconstitutional actions undertaken by federal officers in their official capacities. See *id.* at 150–51; *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 326–27 (2015). But proceeding under that theory means the only proper defendant is Secretary Yellen. See *Armstrong*, 575 U.S. at 326–27.

Mano's claim against Secretary Yellen—even if we permitted it to proceed—faces another fatal hurdle: lack of Article III standing. A plaintiff must suffer an "injury in fact" that is "concrete and particularized," "actual or imminent, not conjectural or hypothetical," and redressable by a favorable verdict. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (cleaned up). Such injury must persist throughout the life of a case. See *Camreta v. Greene*, 563 U.S. 692, 701 (2011).

While this appeal was pending, Mano chose to file his FBAR. In doing so, he mooted any privacy-related harms he might have suffered from the initial filing, confining his injury to that which might arise from the government's continued possession of his information and the risk that he may have to file again.

Any potential harm from having to file a second FBAR is entirely speculative, however. Mano became subject to the FBAR filing requirement when he received an initial retirement bonus that put his Japanese bank account over $10,000 for the first time since moving to Japan in 2013. Nothing suggests he will receive another such bonus or that he intends to exceed the reporting threshold again. Indeed, Mano regularly wires money to a U.S. bank account to keep his Japanese account balance below $10,000. So Mano lacks standing to pursue further prospective relief. See *Crawford v. United States Dept. of Treasury*, 868 F.3d 438, 460–61 (6th Cir. 2017) (dismissing for lack of standing a pre-enforcement challenge to the FBAR filing requirement).

Mano also cannot point to any continuing injury from having filed an FBAR. He asserts that because he filed the FBAR, the government now can "rummage through"

and monitor his financial transactions. But this misapprehends the effect of filing the report. While the information in an FBAR may be used to help trace funds used for illicit purposes, *Bittner v. United States*, 598 U.S. 85, 89 (2023), nothing suggests that the government uses the information to actively monitor a bank account. Mano intimates that the information about his bank accounts could be used in a future criminal investigation, but that would be contingent upon him committing a crime—another speculative assumption. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102–03 (1983). Mano fails to show how he continues to be harmed by the government simply knowing identifying information about his bank account at a single point in time.

Because Mano fails to identify a proper cause of action with regard to at least two of the three named defendants, and because he has no standing to sue the third, we conclude that the district court lacked subject-matter jurisdiction to review his claims. So we modify the judgment of the district court to a dismissal without prejudice under Federal Rule of Civil Procedure 12(b)(1), see *White v. Ill. State Police*, 15 F.4th 801, 808 (7th Cir. 2021), and affirm the judgment as modified.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GEORGE GAIO MANO, Plaintiff, v. JANET YELLEN as Secretary of the United States Department of Treasury, US DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, and UNITED STATES OF AMERICA, Defendants.	)	No. 1:22-cv-01037-RLY-MJD

ENTRY GRANTING DEFENDANTS' MOTION TO DISMISS

The Bank Secrecy Act and its implementing regulations require individuals possessing foreign bank accounts with an aggregate balance of more than $10,000 to file an annual report known as an "FBAR" (or Report of Foreign Bank and Financial Accounts) with the Treasury Department. 31 U.S.C. § 5314; 31 C.F.R. § 1010.350. The Act imposes civil monetary penalties for violations of the reporting requirement. 31 U.S.C. § 5321.

Plaintiff George Gaio Mano, proceeding *pro se*, initiated this suit on May 18, 2022, seeking an injunction prohibiting Defendants from enforcing the FBAR filing requirement against him. He argues the reporting requirement violates his rights under the Fourth, Fifth, Ninth, and Tenth Amendments of the United States Constitution.

Defendants move to dismiss Plaintiff's Complaint under Federal Rules of Civil Procedure 12(b)(1) (lack of subject-matter jurisdiction), 12(b)(4) (insufficient process),

12(b)(5) (insufficient service of process), and 12(b)(6) (failure to state a claim). For the reasons that follow, the court concludes its subject matter jurisdiction is secure. However, Plaintiff has failed to state a claim upon which relief can be granted. Defendants' motion to dismiss is therefore **GRANTED**.[1]

I. Background

Plaintiff is a United States citizen. (Filing No. 1, Compl. at 5). In March 2013, he moved to Japan and began working at Tenri University. (*Id.*). His monthly salary from that employment never exceeded $10,000 and was first deposited in a foreign bank account. (*Id.*). Plaintiff generally wired the bulk of his monthly income to a different bank account based in the United States. (*Id.*). As such, the balance of his foreign bank account remained below $10,000—until 2021. (*Id.*).

In May 2021, Plaintiff reached the age of sixty, which triggered an "initial retirement" at Tenri University and a lump-sum "severance pay" of $35,042. (*Id.*). The balance of Plaintiff's foreign bank account thus exceeded $10,000, obligating him—for the first time—to file an FBAR with the Treasury Department. (*Id.*).

The FBAR requires Plaintiff to reveal, among other things, the foreign financial institutions at which he has an account, the type of account, the account number, and the maximum value of the foreign account. (Filing No. 27-1, Report of Foreign Bank and Financial Accounts).

[1] The court does not reach the remaining bases for dismissal.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted. To survive dismissal, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating a 12(b)(6) motion to dismiss, the court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the plaintiff. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (citing *Apex Dig., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009)).

The same general rules apply when considering a facial challenge to subject matter jurisdiction under Rule 12(b)(1). *Apex*, 572 F.3d at 443–44. A facial challenge is one where the defendant contends the plaintiff's allegations, even if true, would fail to establish subject matter jurisdiction. *Id.* In challenging Plaintiff's standing, Defendants mount a facial challenge to the court's subject matter jurisdiction. *See Moore v. Wells Fargo Bank, N.A.*, 908 F.3d 1050, 1057 (7th Cir. 2018) ("Standing is an element of subject-matter jurisdiction in a federal civil action.").

III. Discussion

A. Standing

"Under Article III's case and controversy requirement, only parties with a real interest or stake in the litigation have standing to sue in federal court." *Gora v. Cost*, 971

F.2d 1325, 1329 (7th Cir. 1992). "The irreducible constitutional minimum of standing contains three elements:" (1) a concrete and particularized injury in fact that is "actual or imminent, not conjectural or hypothetical," (2) that is "fairly . . . traceable to the challenged action of the defendant" and (3) will likely be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up).

Plaintiff alleges that filing an FBAR will require him to reveal his private bank account information (injury in fact) to Defendants (traceability), and he seeks an injunction prohibiting Defendants from enforcing the filing requirement against him (redressability). That is enough for Article III standing.

Defendants argue Plaintiff has failed to allege an injury in fact because he has no constitutionally protected interest in the foreign banking information at issue. That argument, however, goes to the merits rather than standing. *See Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 736 (7th Cir. 2020) ("[W]hen the existence of a protected . . . interest is an element of the claim, deciding whether the interest exists virtually always goes to the merits rather than standing."). "Otherwise every losing suit would be dismissed for lack of jurisdiction." *Id.* (citation omitted); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 ("[U]nder Article III, an injury in law is not an injury in fact.").

Because Plaintiff has standing, the court's subject matter jurisdiction is secure.

B. Failure to State a Claim

Plaintiff alleges the FBAR filing requirement violates his rights under the Fourth, Fifth, Ninth, and Tenth Amendments of the Constitution. The court examines each constitutional claim in turn.

1. Fourth Amendment

Plaintiff first alleges the FBAR filing requirement constitutes an unreasonable search and seizure in violation of the Fourth Amendment. Defendants argue Plaintiff's Fourth Amendment claim is foreclosed by Supreme Court precedent. The court agrees with Defendants.

In *California Bankers Association v. Shultz*, 416 U.S. 21 (1974), a group of bank depositors brought a Fourth Amendment challenge to now superseded regulations under the Bank Secrecy Act that required "United States citizens, residents, and businessmen to file reports of their relationships with foreign financial institutions." *Id.* at 35. The Supreme Court rejected the depositors' challenge. In doing so, the Court noted that "the Fourth Amendment does not prohibit all requirements that information be made available to the Government" and emphasized Congress's "plenary authority . . . to regulate foreign commerce, and to delegate significant portions of this power to the Executive." *Id.* at 59, 61. The Court observed that "[t]he statutory authorization for the regulations was based upon a conclusion by Congress that . . . foreign financial institutions were being used by residents of the United States to circumvent the enforcement of the laws of the United States." *Id.* at 63. It concluded the regulations were "reasonable in the light of that

statutory purpose" and found "no reason" to invalidate them "[i]f reporting of income may be required as an aid to enforcement of the federal revenue statutes." *Id.*

Plaintiff claims a materially identical reporting requirement for foreign financial accounts under current Bank Secrecy Act regulations violates the Fourth Amendment. *See* 31 C.F.R. § 1010.350(a) ("Each United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship . . . for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons," i.e. the FBAR.). The FBAR simply requires Plaintiff to report the foreign financial institution at which he has an account, the type of account, the account number, and the maximum value of the foreign account. Plaintiff's Fourth Amendment challenge to that requirement fails in light of *California Bankers*.

2. Fifth Amendment

The Fifth Amendment provides that "[n]o Person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." Plaintiff alleges in his Complaint that the FBAR filing requirement violates the Due Process Clause of the Fifth Amendment. In his briefing, he further claims that the filing requirement violates his privilege against self-incrimination. Neither claim survives dismissal.

First, Plaintiff put forward no argument in response to Defendants' contention that he failed to state a claim under the Due Process Clause. He has therefore waived the

claim. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver."); *County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 818 (7th Cir. 2006) ("When presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action.").

Second, Plaintiff failed to allege in his Complaint that the FBAR filing requirement violates his privilege against self-incrimination. He improperly asserts the claim for the first time in his response brief. *See Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989) ("It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss."). In any case, circuit precedent forecloses the claim.

In *In re Special Feb. 2011-1 Grand Jury Subpoena Dated Sept. 12, 2011*, 691 F.3d 903 (7th Cir. 2012), the Seventh Circuit held that compulsory production of foreign bank account records required to be maintained under the Bank Secrecy Act did not violate an individual's privilege against self-incrimination. There, the target witness in a federal tax evasion investigation moved to quash a subpoena demanding he produce records relating to his foreign financial accounts on the grounds that doing so would violate his privilege against self-incrimination. *Id.* at 905. The subpoena demanded records reflecting "the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account." *Id.* This was information that the witness—and other individuals possessing foreign bank accounts—were already required to keep and maintain for government

inspection under regulations implementing the Bank Secrecy Act. *Id.*; *see* 31 C.F.R. § 1010.420.

The Seventh Circuit concluded that the witness could not invoke the privilege against self-incrimination to resist the subpoena because the records sought fell under the Required Records Doctrine. *In re Grand Jury Subpoena*, 691 F.3d at 905 (explaining that "records required to be kept pursuant to a valid regulatory program fall outside the scope of the Fifth Amendment privilege if certain conditions are met"). Important here, the information sought in the subpoena—and required to be kept by 31 C.F.R. § 1010.420—is identical to the information that must be submitted through the FBAR. Accordingly, Plaintiff cannot resist filing an FBAR by asserting his Fifth Amendment privilege against self-incrimination.

It follows that Plaintiff has failed to state a claim upon which relief can be granted under the Fifth Amendment.

3. Ninth and Tenth Amendments

Finally, Plaintiff alleges the FBAR filing requirement violates his right to privacy under the Ninth and Tenth Amendments. Neither Amendment, however, affords him such a right. *See Froehlich v. State, Dep't of Corr.*, 196 F.3d 800, 801 (7th Cir. 1999) ("The Ninth Amendment is a rule of interpretation rather than a source of rights. . . . Its purpose is to make clear that the enumeration of specific rights in the Bill of Rights is not intended . . . to deny the existence of unenumerated rights."); *United States v. Hardy*, 120 F.3d 76, 78 (7th Cir. 1997) ("The Tenth Amendment is a tautology that reinforces the fact

that Congress can only act according to its enumerated powers."). Thus, Plaintiff has failed to state a claim to relief under the Ninth or Tenth Amendments.[2]

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss (Filing No. 26) is **GRANTED**. Because amendment of the Complaint would be futile, final judgment will enter accordingly. Plaintiff's pending Motion for Declaratory Judgement (Filing No. 29) is **DENIED AS MOOT**.

SO ORDERED this 1st day of August 2023.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record

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[2] Defendants also argue that Plaintiff has failed to show he is entitled to permanent injunctive relief. Arguments about the propriety of the remedy, however, are premature at this stage. *See Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) ("And even if the district court was right that Bontkowski is seeking relief to which he's not entitled, this would not justify dismissal of the suit. Although Rule 8(a)(3) of the civil rules requires that a complaint contain 'a demand for judgment for the relief the pleader seeks,' the demand is not itself a part of the plaintiff's claim . . . and so failure to specify relief to which the plaintiff was entitled would not warrant dismissal under Rule 12(b)(6).").