

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CIVIL ACTION
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JAMES L. LEUTHE : NO. 01-203

M E M O R A N D U M

WALDMAN, J.

March 20, 2002

I. Introduction

This case arises from FDIC bank examinations of First Lehigh Bank in Walnutport, Pennsylvania between 1987 and 1992 which ultimately resulted in defendant's removal from participation in the affairs of the bank. Defendant was also assessed a civil monetary penalty by the FDIC on June 23, 1995. Defendant has never paid the penalty and the government has now filed suit to enforce it. Defendant has asserted affirmative defenses and corresponding counterclaims for setoff and recoupment of the amount of the penalty which he claims was improperly assessed.

Presently before the court is the government's motion for summary judgment, to dismiss defendant's counterclaims pursuant to Fed. R. Civ. P. 12(b)(6) and to strike his affirmative defenses.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." See Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, such as those found in the pleadings, but rather must present evidence from which a jury could reasonably find in his favor. See Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

Dismissal for failure to state a cognizable claim is appropriate when it clearly appears that the non-movant can prove no set of facts in support of the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A court may also consider documents appended or integral to the pleadings and matters of public record. See Fed. R. Civ. P. 10(c); Churchill v. Star Enter., 183 F.3d 184, 190 n.5 (3d Cir. 1999); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426 (3d Cir. 1997); Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). A court, however, need not credit conclusory allegations or legal conclusions in deciding a motion to dismiss. See General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 333 (3d Cir. 2001); Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997). A claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought.

See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

A motion to strike an affirmative defense is tested under essentially the same standard. Such a motion is appropriately granted when it clearly appears that defendant cannot prove a set of facts in support of his defense sufficient to defeat the claim to which it is addressed. See Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986); IBM Corp. v. Comdisco, Inc., 834 F. Supp. 264, 266 (N.D. Ill. 1993); United States v. Geppert Bros., Inc., 638 F. Supp. 996, 998 (E.D. Pa. 1986).

III. Facts

From defendant's averments and the other competent evidence of record, as uncontroverted or otherwise viewed in a light most favorable to defendant, the pertinent facts are as follow.

Defendant was a shareholder of Walnutport State Bank in 1970. He became a member of Walnut Street Bank's board of directors in 1971. On February 18, 1981, defendant was elected Chairman of the board of that bank. On February 1, 1983, Walnutport State Bank merged with and became known as First Lehigh Bank (the "Bank").¹ The Bank is a wholly owned subsidiary

¹ First Lehigh Bank is an FDIC insured state nonmember bank. It is a Pennsylvania corporation.

of First Lehigh Corporation ("FLC"), a one-bank holding company of which defendant was controlling shareholder.² After the merger defendant continued to serve as Chairman of the board of directors of the Bank until May 1, 1993.³ Defendant was also chairman of the board of directors of FLC from October 15, 1982 through 1992.

The Bank was subject to regular examinations conducted by the Federal Deposit Insurance Corporation ("FDIC") and periodic examinations by the Pennsylvania Department of Banking ("DOB"). After an examination by the FDIC in 1987, the agency noted in a report of February 20, 1987 significant deterioration in all operational areas of the bank and cited pervasive violations of laws and regulations, particularly those designed to prevent insider abuse including transactions prohibited by Regulation "O" of the Regulations and Board of Governors of the Federal Reserve System, 12 C.F.R. 215. On October 29, 1987, the Bank's board of directors consented to a cease and desist order pursuant to 12 U.S.C. § 1818(i). This order mandated that the

² When FLC was formed in 1983, defendant acquired approximately 51.8% of the issued and outstanding shares of its common stock.

³ From 1971 to 1976 Defendant continued to acquire shares of the Bank and was approved by regulatory agencies as a controlling shareholder.

Bank take affirmative actions to correct the unsafe and unsound practices identified in the 1987 examination report.⁴

A January 31, 1989 FDIC report of examination of the Bank revealed eleven new violations of laws and regulations and noted that the Bank was in substantial noncompliance with the 1987 cease and desist order. On May 28, 1991, the FDIC and DOB issued a joint report of examination of the Bank which discussed the continuation of unsafe and unsound practices as well as violations of laws and regulations. A subsequent joint report of examination was issued on May 26, 1992. The Bank again consented to a cease and desist order, which was issued on June 10, 1992.

⁴ The Bank was required to increase its primary capital by a minimum of \$3,500,000 within 120 days of November 9, 1987; the Bank was prohibited from extending new or additional credit to any borrower obligated on a loan that had been charged off so long as the balance remained outstanding; the Bank was required to eliminate and correct all violations of law and regulations described in the report; the Bank's directors were required to implement procedures for detailing in a certified statement all entities and ventures of such directors financially related to the Bank; the Bank was required to establish a committee of independent, outside directors to ensure compliance with the provisions of the cease and desist order; within sixty days of November 9, 1987, the Bank had to revise, adopt and implement written lending and collection policies and procedures to provide effective guidance and control over the Bank's lending function; the Bank had to revise, adopt and implement a written investment policy to provide effective guidance and control over the Bank's investment function; the Bank was prohibited from declaring or paying any cash dividends from its capital stock unless certain conditions were met; the Bank was to institute a program to ensure that all officers and employees were fully trained and knowledgeable as to their duties and responsibilities; and, the Bank had to increase the reserve for loan losses by a minimum \$1,000,000 and thereafter maintain an adequate reserve.

On September 17, 1992, the Bank stipulated to a temporary cease and desist order issued by the DOB which required the Bank to cease all lending activities except for small installment loans.

By the fall of 1992, the equity capital of the Bank was almost extinguished and the Bank was almost insolvent. On December 9, 1992, the FDIC commenced an action to terminate the Bank's insured status. By letter of December 10, 1992, the FDIC informed the Bank it had five days to correct certain conditions referenced in the letter. A letter was also faxed to the Bank by the DOB on the same day citing problems that needed attention. On December 11, 1992, the DOB initiated proceedings to take possession of the Bank.

The Bank then filed an Application for Special Injunctive Relief in the Commonwealth Court which enjoined the DOB from taking over the Bank until hearings were held on the matter. Following eighteen days of hearings, a settlement was reached between the FDIC, the DOB and the Bank on February 3, 1993. As part of the settlement defendant agreed to cause an infusion of capital, to reduce the Bank's assets through the sale of two branches, to resign as a director of the Bank, to cease all day-to-day involvement with the Bank for a period of two

years commencing May 1, 1993 and to place his stock in a voting trust.⁵

On June 23, 1995, the FDIC issued a fifty-six page Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay and Notice of Hearing against defendant and Harold R. Marvin, Jr.⁶ After a detailed analysis of numerous violations by the Bank, the FDIC concluded that a civil money penalty should be assessed against defendant in the amount of \$500,000.⁷

A hearing before an Administrative Law Judge ("ALJ") commenced on July 8, 1996 and, with two periods of recess,

⁵ Defendant infused \$1,000,000 of his personal funds into the Bank and induced others to invest \$1,285,000.

⁶ Mr. Marvin was elected to the Bank's board of directors on April 20, 1984. On July 31, 1985 Mr. Marvin was appointed President and Chief Executive Officer ("CEO") of the Bank. He resigned as the Bank's President and CEO on October 21, 1992 and resigned as a director on February 28, 1993. Mr. Marvin was assessed a civil monetary penalty of \$300,000 which has been satisfied.

⁷ The FDIC found that there were violations of the cease and desist orders of October 29, 1987 and June 10, 1992; violations of section 23A of the Federal Reserve Act (12 U.S.C. § 371c); violations of section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b); and violations of Regulation O of the Board of Governors of the Federal Reserve System (12 C.F.R. Part 215). In sum, the FDIC found that defendant engaged in unsafe or unsound practices in conducting the affairs of the Bank, breached his fiduciary duty and engaged in misconduct which caused or was likely to cause more than a minimal loss to the Bank and resulted in pecuniary gain for defendant.

continued until February 11, 1997.⁸ On February 13, 1998, the ALJ issued a one hundred and three page decision concluding that defendant should be prohibited from future participation in the affairs of any federally insured financial institution and be assessed a civil money penalty of \$250,000.

The ALJ found that the Bank repeatedly violated provisions of the 1987 cease and desist order from the time it was issued through 1992. The ALJ detailed the Bank's consistent failure to comply and its numerous "unsafe and unsound operations" including interested transactions by defendant as well as extension of credit in excess of the Bank's capital and without proper collateralization.⁹ The ALJ found that defendant "was not only the owner of controlling stock ownership of the Bank, but was also the only non-officer director on the executive, finance audit and loan committees." The ALJ found

⁸ On August 8, 1996, defendant filed a complaint in this court seeking to have the FDIC's administrative enforcement proceedings which were then underway declared null and void on the ground that procedures for enforcement under the Financial Institutions Reform, Recovery and Enforcement Act were unconstitutional and illegal. See Leuthe v. Office of Financial Institution Adjudication, 977 F. Supp. 357 (E.D. Pa. 1997). Judge Joyner dismissed the action for lack of subject matter jurisdiction. See id. at 361-62. The Third Circuit affirmed. Leuthe v. Office of Financial Institution Adjudication, 162 F.3d 1151 (3d Cir. 1998) (table opinion). See also Horvath v. FDIC, 20 F. Supp. 2d 844, 846 n.1 (E.D. Pa. 1998).

⁹ The ALJ examined all of the business organizations in which defendant had a stake and with which the Bank conducted transactions.

that defendant's actions resulted in financial gain to him and loss and other damage to the institution and its depositors. The ALJ concluded that a reduction of the penalty to \$250,000 was warranted because of defendant's "general lack of attempt to hide the existence of violations, virtually all of which were clearly evidenced by the bank records."

The FDIC issued a final Decision and Order to Prohibit From Further Participation and Assessment of Civil Money Penalty on June 26, 1998. The FDIC adopted the ALJ's recommendation, including a reduction of the civil monetary penalty to \$250,000.

As provided by 12 U.S.C. § 1818(h), defendant petitioned for review of the FDIC order barring his participation in banking and assessing the \$250,000 penalty to the U.S. Court of Appeals for the District of Columbia. The Court denied defendant's petition. See Leuthe v. FDIC, 1999 WL 334497 (D.C. Cir. May 5, 1999). The Court rejected defendant's claim that the FDIC determination was not supported by substantial evidence and concluded that to the contrary, there was "ample evidence in the record" for "the Board's conclusion that [defendant] was responsible for First Lehigh Bank's numerous unsafe and unsound loans, violations of a cease and desist order against the bank, and violation of regulatory requirements." Id. at *1. The Circuit Court also rejected defendant's claims that his due process rights had been infringed, that the FDIC misled him about

its contemplation of an enforcement action that he had been a victim of a conspiracy between the FDIC and DOB. See id.

By letter of July 29, 1999, the FDIC demanded payment of the penalty and notified defendant that if such were not received by August 13, 1999, the FDIC would proceed with appropriate collection action. The United States, on behalf of the FDIC, ultimately initiated the instant action seeking to recover from defendant the \$250,000 penalty.

Defendant asserted two affirmative defenses and two corresponding counterclaims. With one affirmative defense, defendant claims entitlement to set off the amount of the penalty as "damages he suffered as a result of the FDIC's wrongful actions." In the other, he seeks recoupment of the amount of the penalty as damages for the FDIC's wrongful conduct.¹⁰ In his counterclaims, defendant also seeks to set off damages he suffered by reason of the FDIC's improper conduct and to recoup the exact amount the government is seeking from him.¹¹ The gravamen of defendant's defense and counterclaims is that the

¹⁰ Defendant actually pled three affirmative defenses. Under the caption "First Affirmative Defense," however, defendant asserts no affirmative defense but only admissions or denials of plaintiff's allegations.

¹¹ In paragraph 80 of the Answer, Affirmative Defenses and Counterclaim, defendant asserts that "he is not seeking affirmative recovery in this case but instead only an action by way of setoff and recoupment against the \$250,000 Civil Money Penalty for which the United States of America seeks recovery."

while misleading him to believe it was attempting to assist the Bank in addressing deficiencies and problem loans, the FDIC was actually contemplating an enforcement action and conspiring with the DOB "to put the Bank out of business and thereby effectively remove [defendant] from banking." Defendant alleges that the result of the FDIC action was to "deprive [defendant] of his stock ownership interest in [FLC], and/or to substantially diminish the value of that stock ownership interest."

In his first counterclaim, defendant asserts that the FDIC violated 42 U.S.C. § 1983 by engaging in a "scheme to separate [defendant] from the Bank" without due process and did so as "a state actor by virtue of its manipulation, direction and control of the State DOB." He asserts in the second counterclaim that "the actions of the FDIC, in attempting to seize [the Bank], constituted an intentional tortious interference with the property rights -- being the FLC shares owned by him --, of [defendant], also constituting an attempted intentional conversion/seizure of a substantial portion of the value of [defendant's] stock ownership in FLC for which defendant may obtain relief pursuant to the Federal Tort Claims Act." Defendant alleges that these actions resulted from ill will between him and his former brother-in-law, a former FDIC employee and President of the First National Bank of Palmerton, and from

the attitude of the FDIC which "has for a number of years negatively viewed financial institutions which they refer to as 'one-man banks.'"

IV. Discussion

A. Plaintiff's Motion Summary Judgment

The government seeks summary judgment on its claim to enforce the civil monetary penalty. The government contends that defendant has exhausted all available appeals and the penalty against him is final.

Defendant's civil monetary penalty was imposed pursuant to 12 U.S.C. § 1818(i)(2). The government has appropriately applied to this court for enforcement. See 12 U.S.C. § 1818(i)(2)(I).

Section 1818(i)(2)(I), entitled "Collection" provides:

(i) Referral

If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court.¹²

(ii) Appropriateness of penalty not reviewable

In any civil action under clause (i), the validity

¹² Applicable federal regulations provide that an order becomes final and effective immediately upon service. See Office of Thrift Supervision, 985 F. Supp. 1465, 1472 (S.D. Fla. 1997) (citing 12 U.S.C. §§ 1818(h), 1818(i)(2)(K) and 12 C.F.R. § 509.103(a)).

and appropriateness of the penalty shall not be subject to review.

The court has jurisdiction to enforce the civil monetary penalty pursuant to 12 U.S.C. § 1818(i)(1). See Office of Thrift Supervision v. Paul, 985 F. Supp. at 1470.¹³ The court's jurisdiction, however, is limited to a consideration of whether the order is final and effective. See id. at 1471-72.¹⁴

With the exception of the limited circumstances noted, § 1818(i)(1) makes clear that "except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend,

¹³ Section 1818(i)(1) reads in pertinent part:

The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 1831o or 1831p-1 of this title, and such courts shall have jurisdiction and power to order and require compliance herewith.

¹⁴ Section 1818 only provides for review in federal court in three limited circumstances. First, a permanent cease and desist order may be reviewed by a court of appeals at the request of either party pursuant to § 1818(h)(2). See Eastern Nat'l Bank v. Conover, 786 F.2d 192, 193 (3d Cir. 1986). Second, pursuant to § 1818(c)(2), a bank may seek relief in a court of appeals from a temporary cease and desist order issued under § 1818(c)(1) before the completion of cease and desist proceedings. See id. Last, the appropriate federal banking agency may apply to a district court for enforcement of a cease and desist order. See id.; Leuthe, 977 F. Supp. at 362 n.2 (discussing limited instances in which district court has jurisdiction).

terminate, or set aside any such notice or order." See also Abercrombie v. Office of Comptroller of Currency, 833 F.2d 672, 674 (7th Cir. 1987).

There are no genuine issues of material fact with regard to the finality, validity and effectiveness of the FDIC order, or defendant's failure to pay the assessed penalty.¹⁵

B. Plaintiff's Motion to Strike Defendant's Affirmative Defenses and Dismiss Defendant's Counterclaims

The government asserts that defendant's counterclaims and affirmative defenses are barred by § 1818(i)(1) and the doctrines of claim and issue preclusion.

Defendant suggests that he is not "attacking the FDIC's Decision and Order particularly in any way which violates 12 U.S.C. Section 1818." It is clear from the face of defendant's affirmative defenses and counterclaims, however, that he cannot sustain them without a showing that the FDIC order barring his participation in banking for conduct which also gave rise to the penalty was unjustified.¹⁶ As a practical matter, adjudication of these defenses and counterclaims would necessarily involve a

¹⁵ It is uncontested that defendant pursued all possible avenues of administrative and judicial relief, and has not filed a petition for certiorari following the denial of his petition for review by the Circuit Court.

¹⁶ Indeed, the absence of legal justification is an essential element which must be proved to sustain a claim for conversion. See Universal Premium Acceptance Corp. v. York Bank & Trust Co., 69 F.3d 695, 704 (3d Cir. 1995); Schulze v. Legg Mason Wood Walker, Inc., 865 F. Supp. 277, 284 (W.D. Pa. 1994).

review of the propriety of the FDIC's final order barring defendant from banking and imposing the penalty. Such is precluded by § 1818(i)(1). See Abercrombie, 833 F.2d at 674, 677; First National Bank of Scotia v. United States, 530 F. Supp. 162, 167 (D.D.C. 1982). See also Groos Nat'l Bank v. Comptroller of Currency, 573 F.2d 889, 895 (5th Cir. 1978); Office of Thrift Supervision, 985 F. Supp. at 1470; Leuthe, 977 F. Supp. at 362.

Res judicata or claim preclusion gives dispositive effect to a prior final judgment on the merits to preclude re-litigation of a claim or litigation of a claim which, although not litigated, could have been raised in the earlier proceeding involving the same parties or their privies. See Huck ex rel. Sea Air Shuttle Corp. v. Dawson, 106 F.3d 45, 49 (3d Cir. 1997); Board of Trustees of Trucking Employees of North Jersey Pension Fund v. Centra, 983 F.2d 495, 504 (3d Cir. 1993). Defendant contends that res judicata does not apply because the ALJ and FDIC "refused to permit [defendant] to raise and be heard to rely upon the collaborative conduct of the FDIC and State DOB, in the 1992/1993 time frame, to effect an ex parte seizure of First Lehigh Bank, designed to drive this 'one man bank' out of business." The pertinent administrative and court records, however, clearly demonstrate otherwise.

On page six of the FDIC final Decision and Order, defendant's conspiracy claim is discussed at length. The FDIC

quotes from the ALJ who specifically addressed defendant's claim of conspiracy. The FDIC order specifically refers to the ALJ's rejection of this conspiracy claim and expressly affirms that decision. It is also clear that the Circuit Court considered and rejected the conspiracy claim. The Court expressly discussed defendant's claims including "that the government was involved in a conspiracy with state bank examiners." The Court concluded that there was "no merit" in any of defendant's claims. Leuthe v. FDIC, 1999 WL 334497 at *1.

Not only the issue of whether defendant was a victim of a conspiracy among bank regulators but the ultimate issue of the propriety of the FDIC conclusions and order was presented in his petition for review of the FDIC's Decision and Order, was actually litigated and was resolved in a valid court determination necessary to its final judgment on the merits. As such, the litigation of any claim dependent on proof of a conspiracy or the impropriety of defendant's removal from the Bank is barred by the doctrine of issue preclusion "whether or not the issue arises on the same or a different claim." E. Pilots Merger Cmte. v. Continental Airlines, Inc., 279 F.3d 226, 232 (3d Cir. 2002). See also Henglein v. Colt Indus., 260 F.3d 201, 209 (3d Cir. 2001). This would include the issue of the absence of legal justification for the challenged FDIC actions, without which defendant cannot establish conversion.

The government contends that defendant also fails to state a § 1983 claim inasmuch as neither the United States nor the FDIC is a "person" covered by § 1983, and that the statute of limitations has expired.

Defendant seeks only recoupment and has expressly disclaimed any cause of action for affirmative relief. Such a counterclaim is not barred by the statute of limitations. See United States of America v. Thurber, 376 F. Supp. 670, 674 (D. Vt. 1974); United States of America v. Carson, 360 F. Supp. 842, 844 (S.D. Tex. 1973).¹⁷

The government, however, is correct that neither the United States nor the FDIC is a "person" subject to liability under § 1983. See Hinder v. FDIC, 137 F.3d 148, 158 (3d Cir. 1998)(federal agencies are not "persons" subject to § 1983 liability "whether or not in alleged conspiracy with state actors").

The government also argues with some force that a claim the FDIC interfered with defendant's operation of the Bank and

¹⁷ Any counterclaim for relief other than recoupment would also be barred by defendant's admitted failure to pursue administrative remedies, see 28 U.S.C. § 2675(a); Livera v. First Nat'l State Bank of New Jersey, 879 F.2d 1186, 1194-95 (3d Cir. 1989), and by the discretionary function exclusion. See 28 U.S.C. § 2680(a); Federal Deposit Ins. Corp. v. Irwin, 916 F.2d 1051, 1054-55 (5th Cir. 1990); Bernitsky v. United States, 620 F.2d 948, 952 (3d Cir. 1980); Federal Deposit Ins. Corp. v. Renda, 692 F. Supp. 128, 134-35 (D. Kan. 1988); FDIC v. Jennings, 615 F. Supp. 465, 467 (W.D. Okla. 1985).

his concomitant opportunity to maintain or increase the value of his holdings in the Bank is more akin to a claim for interference with contractual rights than conversion.¹⁸

"Interference with contract rights" has been broadly interpreted to include not only actual contracts, but any prospective business expectancies or advantage. See Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1154-55 (D.C. Cir. 1985); Small v. United States, 333 F.2d 702, 704 (3d Cir. 1964) (no FTCA claim lies for deprivation of right to pursue lawful business which is analogous to claim based on unlawful interference with contract and governed by same principles). The government's conclusion that the second counterclaim is thus also barred by the FTCA exclusion in § 2680(h), however, lacks force. "Even claims that are specifically barred by the FTCA through 28 U.S.C. § 2680 may be brought under the doctrine of recoupment." FDIC v. diStefano, 839 F. Supp. 110, 123 (D.R.I. 1993). See also United States v. Johnson, 853 F.2d 619, 621 (8th Cir. 1988); Cox v. Kurt's Marine Diesel of Tampa, Inc., 785 F.2d 935, 936 (11th Cir. 1986); Federal Deposit Ins. Corp. v. Lattimore Land Corp., 656 F.2d 139, 142-43 (5th Cir. 1981); Federal Deposit Ins. Corp.

¹⁸ The government correctly notes that defendant actually pled "attempted" conversion and has cited no authority which suggests Pennsylvania has recognized such a tort. Nevertheless, defendant has characterized this counterclaim in his brief as one for conversion and the court will accept that characterization for purposes of the instant motion to dismiss.

v. Citizens Bank & Trust Co., 592 F.2d 364, 372-73 (7th Cir.),
cert. denied, 444 U.S. 829 (1979); U.S. ex rel. Kirsch v.
Armfield, 56 F. Supp. 2d 588, 592 (W.D. Pa. 1998); United States
v. Royal Geropsychiatric Services, Inc., 8 F. Supp. 2d 690, 696
(N.D. Ohio 1998).¹⁹ In any event, whether characterized as
conversion or tortious interference with contractual rights, this
counterclaim is barred by § 1818 and by principles of issue
preclusion.²⁰

V. CONCLUSION

"The administrative review procedure is the safeguard
provided by Congress against arbitrary action or abuse of
discretion by administrators in carrying out their
responsibilities under federal statutes." Bernitsky, 620 F.2d at
956. Defendant had an opportunity to adjudicate all of the
contentions on which his counterclaims and affirmative defenses
are predicated. They were rejected and the validity of the FDIC
order giving rise to the government's claim herein was ultimately

¹⁹ There has been no contention by the government that the
counterclaims do not arise from the same transaction or
occurrence giving rise to its claim and, as noted, defendant
seeks no affirmative relief but only an amount limited to the
\$250,000 sought by the government. See diStefano, 839 F. Supp.
at 123.

²⁰ Lack of lawful justification is also an element of any
claim for tortious interference with contractual or prospective
contractual rights. See Nathanson v. Medical College of
Pennsylvania, 926 F.2d 1368, 1388 (3d Cir. 1991); Advent Systems
Ltd. v. Unisys Corp., 925 F.2d 670, 673 (3d Cir. 1991).

upheld by the Circuit Court. Defendant is effectively seeking a second bite at the apple to which he is not entitled.

Defendant's affirmative defenses and counterclaims could not be adjudicated without a review of the propriety of a final order of the FDIC. This is precluded by § 1818(i)(1). Issues on which defendant would have to prevail to sustain these defenses and counterclaims have been litigated and resolved against him in a valid court determination necessary to its final judgment on the merits. They are now barred by principles of issue preclusion. Also, the United States and its agencies are not subject to liability under § 1983.

Accordingly, the government's motions will be granted. Appropriate orders will be entered, as well as judgment in favor of the United States for the "\$250,000 plus interest on the judgment at the legal rate until paid" requested in the Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CIVIL ACTION
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JAMES L. LEUTHE : NO. 01-203

ORDER AND JUDGMENT

AND NOW, this day of March, 2002, upon
consideration of plaintiff's Motion for Summary Judgment (Doc.
#5, part 1) and defendant's response thereto, consistent with the
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is
GRANTED and **JUDGMENT** is **ENTERED** in the above action for plaintiff
the United States of America and against defendant James L.
Leuthe in the amount of \$250,000 plus post-judgment interest at
the legal rate pursuant to 28 U.S.C. § 1961.

BY THE COURT:

JAY C. WALDMAN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CIVIL ACTION
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JAMES L. LEUTHE : NO. 01-203

O R D E R

AND NOW, this day of March, 2002, upon
consideration of plaintiff's Motions to Dismiss Counterclaims
(Doc. #5, part 2) and to Strike Affirmative Defenses (Doc. #5,
part 3), and defendant's response thereto, consistent with the
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motions
are **GRANTED**.

BY THE COURT:

JAY C. WALDMAN, J.