

NOT FOR PUBLICATION

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

JAMES KEAN, EARNEST KEAN, ALVA )  
MARSH, WARREN MARSH, JEWEL )  
MOOLENAAR-MARSH, and PATRICIA )  
LOONEY, )

Plaintiffs, )

v. )

LELIA ADLER, IRMA CALIJOHNI, )  
CAROLYN ORTIZ, individually and as )  
Executor of the ESTATE OF HALLIE )  
ORTIZ, OUIDA NELSON, NELINDA )  
NELSON, VALENTINO NELSON, JOSEPH )  
ADLER, THE UNITED STATES OF )  
AMERICA, THE NATIONAL PARK SERVICE, )  
and URIS DALMIDA, )

Defendants. )

Civ. No. 98-176

APPEARANCES :

**Richard Knoepfel, Esq.**

St. Thomas, U.S.V.I.

*For plaintiffs James Kean, Earnest Kean, Alva  
Marsh, Warren Marsh, Jewel Moolenaar Marsh, and  
Patricia Looney,*

**Carol Ann Rich, Esq.**

St. Thomas, U.S.V.I.

*For defendant Carolyn Ortiz,*

**Alan Smith, Esq.**

St. Thomas, U.S.V.I.

*For defendants Ouida Nelson, Nelinda Nelson, and  
Valentino Nelson,*

**Joycelyn Hewlett**

**Assistant U.S. Attorney**

St. Thomas, U.S.V.I.

*For defendant United States.*

#### **MEMORANDUM**

This matter came before the Court on June 7, 2002 for argument on whether this Court should grant the United States ["government"] leave to file its untimely Answer to the Amended Complaint and Cross-claim against Carolyn Ortiz. For the following reasons, as well as those given from the bench, I found that to permit the United States' counterclaim to proceed was not in the interests of justice, and denied the government leave to file its claim.

#### **I. FACTUAL AND PROCEDURAL BACKGROUND**

In September 1998, James Kean, Earnest Kean, Alva Marsh, Warren Marsh, Jewel Moolenar Marsh, and Patricia Looney [collectively "plaintiffs"] initiated this action in the Territorial Court against defendants, named as Leila Adler, Irma Calijohni, Hallie Ortiz, Ouida Nelson, Joseph Adler, Valentino Nelson, Nelinda Nelson and the United States ["government" or "United States"]. At the heart of the plaintiff's lawsuit is a March 27, 1961 deed in which Harvey Monroe Marsh ["Marsh"] conveyed certain property on St. John, U.S. Virgin Islands, described as Estate Maho Bay (Maho Bay Quarter) and Estate

Usher's Cay (Coral Bay Quarter) to his eight children, (Io L Kean, Hallie Ortiz, Leila Adler, Irma Caljohni, Carlyle Marsh, Aegist Marsh, Arnett Marsh, Ouida Nelson), the children's mother, (Grace O. Penn), and his two sisters, (Ella Jensen and Ellen Daniel), a life estate, remainder in fee simple absolute to Marsh's grandchildren living or in being at the time of his death. (See Opp'n to Allowance of the Mislabeled Cross-cl. of the United States, Ex. 3.) The plaintiffs, Marsh's grandchildren, allege that they each are holders of future interests to the property conveyed in the 1961 deed, and that the defendants, as holders of life estates in the property, had failed to pay and keep current all property taxes and other assessments against the property. The plaintiffs sought injunctive relief, appointment of a receiver, and partition of real property. (See Notice of Removal of a Civil Action, Ex. A. (Compl.).)

On September 30, 1965, in a separate deed, Marsh conveyed, in fee simple absolute, approximately three acres in Estate Maho Bay on St. John ["Parcel 3A-3"], to his daughter, Hallie Ortiz.<sup>1</sup>

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<sup>1</sup> The property conveyed to Hallie Ortiz in the 1965 Deed of Gift was bound and described as follows:

On the East by a stone wall,  
On the West by the Sea,  
On the South by the pond and  
On the North by the Public Road.

(See Oppos. to Allowance of the Mislabeled Cross-cl. of the United States, Ex. 1.) In their complaint, the plaintiffs acknowledge that Hallie Ortiz claims a fee simple ownership in these three acres. (Notice of Removal of a Civil Action, Ex. A, ¶ 12.) The plaintiffs failed to serve a copy of the summons and original Complaint upon Hallie Ortiz before her death on April 30, 1999. Hallie Ortiz bequeathed her three-acre property to her daughter, Carolyn Ortiz, who is now a defendant in this case.

The United States was named as a defendant in the Territorial Court action because it holds a three-elevenths (3/11) interest in the estate conveyed in the 1961 deed. On March 24, 1970, three of Marsh's grandchildren (Carolyn Ortiz, Yvonne Hopper and Ronald Ortiz) conveyed their interests in the Maho Bay estate to the National Park Foundation, which in turn transferred those interests to the government in August 1975. (See Oppos. to Allowance of the Mislabeled Cross-cl. of the United States, Exs. 8-10, 13.) When the government answered the original complaint, on November 13, 1998, it admitted that "Hallie Ortiz holds a life estate in a tract at Estate Maho Bay, and that she separately owns, in fee, a three-acre tract at

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(See Opp'n to Allowance of the Mislabeled Cross-cl. of the United States, Ex. 1.) This second conveyance was conditioned upon Hallie Ortiz' use of the property "as a residential site only . . . upon her return from the mainland to live in St. John . . . on a permanent basis." The consideration for the 1965 Deed of Gift was \$10. (See *id.*)

Estate Maho Bay that is separate from the land, which is the subject of this litigation." (Answer of Def. United States, ¶ 12) (emphasis added).) At the same time, the United States removed the case from Territorial Court to this Court, pursuant to 28 U.S.C. § 1441(a).

On May 2, 2000, the plaintiffs filed an amended complaint in which they, for the first time, made the separate three-acre tract at Estate Maho Bay a part of this litigation by asserting that the 1965 Deed to Hallie Ortiz was void and that the three acres of land were also subject to their interests. (Am. Compl. ¶¶ 12-13.) The government did not file an answer to the amended complaint, and did not seek to amend its November 13, 1998 allegations that Hallie Ortiz was the separate fee owner of the other three acres which were then not a part of this case.

Co-defendant Carolyn Ortiz filed her answer to the amended complaint, counterclaims and cross-claims, arguing, *inter alia*, that any and all claims of the plaintiffs or defendants, including the United States, concerning the validity of the September 30, 1965 Deed are barred by (1) the applicable statute of limitations, (2) the equitable doctrines of estoppel, waiver and laches, and (3) the doctrine of adverse possession. She recited her understanding that the United States intended to change its position about the separate three-acre tract. (See

Answer to Am. Compl., Countercl. and Cross-cl. of Def. Carolyn Ortiz, ¶ 54.) In addition, Carolyn Ortiz challenged the validity of the 1961 deed, arguing that the deed is void under the Virgin Islands Statute of Frauds because it does not adequately describe the property to be conveyed. Finally, Carolyn Ortiz sought a declaration that the 1965 Deed to her mother is valid.

In November 2000, the United States filed its answer to the cross-claims of Carolyn Ortiz, asserting only general denials and specifically denying Ortiz' allegation that the United States intended to file a claim challenging the validity of the 1965 Deed to the separate three-acre tract. (Answer of the United States to Cross-cl.'s by Carolyn Ortiz, ¶ 54.) Very significantly, the government did not include in its answer a counterclaim against Carolyn Ortiz claiming any interest in the three acres conveyed in the 1965 Deed.

On January 18, 2001, this Court referred this matter to mediation, which commenced on March 27, 2001. In a letter dated January 26, 2001, the United States took itself out of the mediation regarding "Carolyn Ortiz' claim of title to three acres of the Maho Bay property, advising the parties that the United States would

not participate in the mediation proceedings so long as the only issue that will be discussed is title to the three-acre parcel. The United States will allow the other parties (all family members) to resolve the issue

of the three-acre parcel among themselves.

(See Opp. to Allowance of the Mislabeled Cross-cl. of the United States, Ex. 24.) On February 7, 2001, the government informed the parties that it opposed any mediation of the partition issue originally raised in the Territorial Court, arguing that the partition issue could not be determined until the title issue was resolved. The government opposed mediating title and partition issues together, but had no objection to mediating the partition once the title question was resolved. (See *id.*, Ex. 25.)

Mediation began on March 27, 2001, and was adjourned without resolution so that the parties could prepare and exchange settlement proposals and appraisals for the properties at issue. On August 9, 2001, the government submitted its settlement proposal to all of the other parties. The proposal dealt solely with the partition issues, although the government advised that it had ordered an appraisal of the separate three-acre Ortiz parcel, but it was not ready yet. (See *id.*, Ex. 26.) Mediation resumed nearly one year later, on March 14, 2002. After nearly twenty hours of mediation, the plaintiffs and Carolyn Ortiz reached a settlement of the title disputes over the 1965 Deed and the 1961 Deed. The settlement would fully resolve all title disputes in this action, leaving only the issue of partition of the property conveyed by the March 27, 1961 Deed to the eleven

remainder interests for resolution. Under the settlement, the plaintiffs and Carolyn Ortiz would dismiss all claims between them with prejudice and will cancel all notices of lis pendens of record, upon entry of a Consent Judgment. (See Joint Mot. for Entry of Consent J. and draft Consent J.)

On April 2, 2002, shortly after mediation concluded but nearly two years after the plaintiff's filed their amended complaint, the United States, without seeking leave of this Court, submitted its answer to the amended complaint and its cross-claim against Carolyn Ortiz, individually and as executrix of the Estate of Hallie Ortiz. In its proposed answer, the government challenges the 1965 conveyance to Hallie Ortiz, arguing that it "is void and of no legal effect" because it fails to comply with an earlier judgment from this Court and that Hallie Ortiz failed to comply with the terms of the deed itself.<sup>2</sup>

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<sup>2</sup> Harvey Monroe Marsh originally executed a deed conveying his estate in Maho Bay to his family in 1953, and in 1957, he commenced an action in this Court to set aside the 1953 Deed. (See Opp'n to Allowance of the Mislabeled Cross-cl. of the United States, Exs. 4-6; Order, Civ. No. 80-1957 (D.V.I. Nov. 15, 1957).) In a judgment from this Court, the 1953 Deed was cancelled. In addition, the judgment provided, in pertinent part, that Marsh would

execute a new deed reserving to himself a life estate in [Mahobay Estate, Mahobay Quarter and Estate Usher's Cay, Carol Bay Quarter, St. John, Virgin Islands], with the right, during his lifetime, to sell, at prevailing market prices, without consultation with any other grantee named therein and with his signature alone, such parcels as in the judgment of his advisor [Morris F. de Castro] are necessary for the sole purpose of providing [Marsh] with adequate funds to provide for proper care and maintenance . . . .

(See *id.*, Ex. 5.) The United States challenges the validity of the 1965 Deed

The United States would assert that, by claiming a three-acre parcel of Estate Maho Bay, Carolyn Ortiz is seeking to deprive the government of its three-elevenths (3/11) interest in the three-acre parcel. The government would request that this Court grant its claim against Carolyn Ortiz and find that (1) the 1965 Deed is invalid and (2) the three-acre interest is part of Estate Maho Bay in which the government holds a three-elevenths interest. (See Answer to the Am. Compl. and Cross-cl. of the Def. United States at 8-10.)

Carolyn Ortiz counters that, when she filed her answer to the amended complaint and filed a substantive cross-claim against the government, the United States was then required to raise any counterclaim it had arising out of the same transaction or occurrence.<sup>3</sup> Carolyn Ortiz argues that the government's omission of its claim from its November 1, 2000 answer was not due to oversight, inadvertence, or excusable neglect, and that justice does not require that the claim be allowed. In addition, Carolyn

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to Hallie Ortiz, contending that the 1965 deed does not comply with this Court's Order because (1) the property was not sold at "prevailing market prices," (2) Marsh's adviser was not consulted, and (3) Hallie Ortiz did not comply with the conveyance's requirement that she leave the mainland and live in St. John permanently. (See Answer to the Am. Compl. and Cross-cl. of the Def. United States at 8-10.)

<sup>3</sup> As Carolyn Ortiz correctly points out, and the government concedes, the government's "cross-claim" is more appropriately labeled a counterclaim, as it is in response to her claim against all the other parties, including the United States. Accordingly, this Memorandum Opinion will refer to the claim as a counterclaim.

Ortiz maintains that the government's cross-claim would be futile because the United States lacks standing to contest the 1965 Deed. She argues that the United States acquired its interest in 1975, subject to the 1965 Deed of Gift, which was recorded in 1965, unlike the plaintiffs and other defendants in this action, all of whom acquired their remainder interests directly through the execution of the 1961 Deed. Finally, Carolyn Ortiz maintains that the proposed counterclaim is barred by the doctrines of laches, waiver and estoppel. (Opp'n to Allowance of the Mislabeled Cross-cl. of the United States at 18-29.)

The government argues, *inter alia*, that (1) the United States has repeatedly asserted its claim to the disputed three-acre parcel, and (2) the two mediations were unsuccessful because the government was excluded from the settlement discussions, and (3) the United States intentionally delayed filing its counterclaim because it hoped that the case would settle through mediation. The government avers that it is "understandable" that it delayed filing its answer to the amended complaint and cross-claim, and that justice requires me to allow the claim to proceed so that the government will not be forever barred from bringing it. (See Reply of Def. United States to Opp'n. to Allow. of Cross-cl. of Def. United States.)

Carolyn Ortiz counters, *inter alia*, that the United States

has offered no excuse or explanation for (1) its failure to bring its own quiet title action against Hallie Ortiz from 1970 until 1998, (2) reversing its position in its November 12, 1998 Answer acknowledging that Hallie Ortiz was the fee owner of the three-acre parcel, or (3) its reversal of its decision not to assert a timely cross-claim against Carolyn Ortiz in response to the Plaintiff's Amended Complaint. (See Reply of Def. Carolyn Ortiz to the Resp. of the United States.)

## **II. DISCUSSION**

### **A. Jurisdiction**

This Court has jurisdiction over "any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants." 28 U.S.C. § 1347.

### **B. Permitting the United States to file its Counterclaim against Carolyn Ortiz is not "in the interests of justice"**

When the federal government is sued, it is required to serve an answer to the complaint or cross-claim, or a reply to a counterclaim, within sixty days after the United States attorney is served with the pleading asserting the claim. FED. R. CIV. P. 12(a)(3)(A). A party is required to bring, as a compulsory counterclaim, any claim that arises out of the same transaction

or occurrence that is the subject matter of the opposing party's claim and does not require the presence of third parties for its adjudication. FED. R. CIV. P. 13(a). After the serving of a pleading, a party may, with a court's permission, later bring a counterclaim that has matured or was acquired by the pleader after serving a pleading. FED. R. CIV. P. 13(e). In addition, a court may also permit the filing of a counterclaim by amendment when a pleader fails to file a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires. FED. R. CIV. P. 13(f).

Here, the plaintiffs filed their amended complaint on May 2, 2000.<sup>4</sup> Carolyn Ortiz filed her answer to the amended complaint and counterclaims and cross-claims on August 15, 2000. The government filed its answer to Ortiz' cross-claim on November 1, 2000, as mandated by the magistrate judge. On April 2, 2002, nearly two years after the filing of the plaintiffs' amended complaint, the United States attempted to file its answer without first getting the Court's approval. Clearly, the government is beyond the sixty-day limit imposed by the federal rules, and did

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<sup>4</sup> The government argues that the amended complaint was untimely filed. The record indicates that on March 23, 2000, the magistrate judge gave the plaintiffs leave to amend their complaint, to be filed by April 1, 2000. (See Order, Civ. No. 1998-176 (D.V.I. March 23, 2000).) The complaint was actually filed on May 2, 2000, but it does not appear as though anyone contested its timeliness until the government's answer to the amended complaint.

not seek any extension of time, let alone a two-year continuance.

Moreover, the United States has offered no plausible suggestion for me to be able to find that its delay in filing an answer to the amended complaint was due to oversight, inadvertence, or excusable neglect, or that the claim matured after the amended complaint was filed, as required under Rule 13. To the contrary, the record shows that the government had been aware of its potential claim for nearly thirty years.<sup>5</sup>

I found the government's behavior in this case to be egregious and inexcusable. The United States intentionally decided to file its counterclaim challenging the 1965 Deed after admitting to the Deed's validity in its original answer and deliberately choosing not to join in the plaintiffs' claim in their amended complaint challenging that deed. Indeed, when Carolyn Ortiz accused the United States of intending to challenge her interest in the three acres, the government openly denied the allegation. In addition, the government permitted the families to mediate this matter for over one year, all the while indicating that it was not interested in contesting the 1965 Deed's validity or Carolyn Ortiz' interests to the land. By

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<sup>5</sup> In 1969, a United States Department of Interior employee drafted two memoranda questioning the legitimacy of the 1965 Deed to Hallie Ortiz, noting that the property was not sold at prevailing market prices and the adviser's signature did not appear on the Deed. (See Opp'n to Allowance of the Mislabeled Cross-cl. of the United States, Exs. 6,7.)

attempting to challenge the 1965 Deed now, the United States has, in a word, "sandbagged" this family. To permit this counterclaim to proceed now clearly would not be in the interests of justice as required under Rule 13(f). Accordingly, I denied the government's request for leave to file its Answer to the Amended Complaint and Cross-claim.

### **III. CONCLUSION**

Because the United States' counterclaim against Carolyn Ortiz challenging her interests under the 1965 Deed was untimely filed, and the government failed to establish that its delay was due to inadvertence or excusable neglect, I denied the government's request for leave to file its Answer to the Amended Complaint and Cross-claim. An appropriate order is attached.

**ENTERED this 12th day of August, 2002.**

**FOR THE COURT:**

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

**Thomas K. Moore  
District Judge**

NOT FOR PUBLICATION

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DIVISION OF ST. THOMAS AND ST. JOHN

JAMES KEAN, EARNEST KEAN, ALVA )  
MARSH, WARREN MARSH, JEWEL )  
MOOLENAAR-MARSH, and PATRICIA )  
LOONEY, )

Plaintiffs, )

v. )

LELIA ADLER, IRMA CALIJOHNI, )  
CAROLYN ORTIZ, individually and as )  
Executor of the ESTATE OF HALLIE )  
ORTIZ, OUIDA NELSON, NELINDA )  
NELSON, VALENTINO NELSON, JOSEPH )  
ADLER, THE UNITED STATES OF )  
AMERICA, THE NATIONAL PARK SERVICE, )  
and URIS DALMIDA, )

Defendants. )

Civ. No. 98-176

APPEARANCES :

**Richard Knoepfel, Esq.**

St. Thomas, U.S.V.I.

*For plaintiffs James Kean, Earnest Kean, Alva  
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Patricia Looney,*

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**Alan Smith, Esq.**

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*For defendants Ouida Nelson, Nelinda Nelson, and  
Valentino Nelson,*

**Joycelyn Hewlett,  
Assistant U.S. Attorney**

St. Thomas, U.S.V.I.

*For defendant United States.*

**ORDER**

For the reasons given from the bench, as well as those in the accompanying memorandum, it is **ORDERED** that the United States is **DENIED** leave to file its Answer to the Amended Complaint and Cross-claim against Carolyn Ortiz challenging her interests in a three-acre parcel of land in Maho Bay conveyed in a 1965 deed by Henry Harvey Marsh to her mother, Hallie Ortiz.

**ENTERED this 12th day of August, 2002.**

**FOR THE COURT:**

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

**Thomas K. Moore  
District Judge**

**ATTEST:  
WILFREDO F. MORALES  
Clerk of the Court**

**By: \_\_\_\_\_  
Deputy Clerk**

**Copies to:**  
Hon. Geoffrey W. Barnard  
Richard Knoepfel, Esq.  
Carol Ann Rich, Esq.  
Alan Smith, Esq.  
Joycelyn Hewlett, Asst. U.S. Atty.  
Mrs. Jackson

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Chris Ann Keehner, Esq.  
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