

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11184
Non-Argument Calendar

D.C. Docket No. 0:18-cv-60690-FAM

EVERGREEN MARINE, LTD,

Plaintiff – Appellant,

versus

UNITED STATES OF AMERICA,
United States Department of Justice, Antitrust Division,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 18, 2019)

Before MARCUS, WILSON, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Plaintiff Evergreen Marine, Ltd. (“Evergreen”), purchased a vessel in reliance on the U.S. Coast Guard’s representation that the vessel was unencumbered by a mortgage or other lien. But in fact, there was a mortgage on the vessel, and the mortgage holder later seized the vessel and initiated a foreclosure action. After settling with the mortgage holder, Evergreen sued the United States under the Federal Tort Claims Act (“FTCA”). The district court dismissed the action for lack of subject-matter jurisdiction, concluding that the United States enjoyed sovereign immunity from Evergreen’s claims under the FTCA’s misrepresentation exception, 28 U.S.C. § 2680(h), and Evergreen appeals. After careful review, we affirm.

I.

In March 2012, Evergreen purchased a 60-foot motor yacht, the *Makin Way* (now the *Change of Latitude*), from non-party OIA, Inc. Before purchasing the vessel, Evergreen contacted the U.S. Coast Guard’s National Vessel Documentation Center (“NVDC”) to determine whether a mortgage or lien on the vessel existed and to obtain the vessel’s abstract of title. The NVDC is the repository of vessel documents and abstracts of title for vessels documented in the United States. The NVDC reported that there was no mortgage, so Evergreen went ahead with the purchase. Soon after, Evergreen asked the NVDC to delete the vessel from U.S. documentation and approve the transfer to the registry of the Marshall Islands. The NVDC did so.

In 2015, however, Evergreen received notice that M&T Bank was claiming an unsatisfied mortgage on the vessel. Evergreen again contacted the NVDC, which responded that, contrary to its prior representation, a preferred mortgage in the amount of \$683,212.37 had been recorded with the NVDC in January 2003. But the mortgage, although recorded in the paper file, “was inadvertently not scanned into the electronic system” when the NVDC “migrated from a paper file system to an electronic file system.” NVDC stated that the electronic version of its record was incorrect and that the preferred mortgage remained outstanding.

In November 2015, M&T Bank filed suit to foreclose the mortgage on the vessel. The vessel was seized during the pendency of the lawsuit. Ultimately, Evergreen settled with the Bank and paid \$275,000 to satisfy the mortgage.

After submitting a claim for damages to the Coast Guard, which was not resolved, Evergreen filed this lawsuit against the United States under the FTCA. *See* 28 U.S.C. § 1346(b)(1). Evergreen alleged that it suffered damages, in the amount of at least \$443,441.60, because the NVDC “negligently failed to record the previous mortgage or disclose the previous mortgage to the Plaintiff and it[]s new mortgage holder.” The damages included settlement of the mortgage, damages to the vessel as a result of the seizure, and defense costs. The United States moved to dismiss the complaint on two grounds: (1) Evergreen’s claim was time barred because Evergreen did not establish that it made an administrative claim within two years of

accrual; and (2) the court lacked subject-matter jurisdiction because Evergreen's suit was barred by the misrepresentation exception to the FTCA's waiver of sovereign immunity.

Evergreen responded and moved for leave to file an amended complaint to clarify that the United States's breaches of its "regulatory duties to maintain vessel documentation records" were both "distinct from any representation it made concerning those records" and "also breaches of common law duties under state law." The United States maintained that amendment was futile because Evergreen's claims were barred by the misrepresentation exception, regardless.

In a report and recommendation ("R&R"), a magistrate judge recommended dismissing the complaint as barred by the FTCA's misrepresentation exception. *See* 28 U.S.C. § 2680(h) (barring claims "arising out of . . . misrepresentation," among other torts). Despite Evergreen's efforts to frame the complaint as alleging negligence distinct from the misrepresentation, the magistrate judge explained that courts must look beyond the labels used by a party and ascertain the real cause of the complaint. In doing so, the magistrate judge found that the essence of Evergreen's complaint was "that the Coast Guard provided an incorrect Abstract of Title for the vessel, such that it omitted a previously recorded ship's mortgage that was eventually paid by Evergreen after the vessel's seller defaulted." In short, the essence of Evergreen's complaint was a misrepresentation claim. Finally, the

magistrate judge concluded that amendment would be futile because Evergreen's proposed amendments "cannot extricate Evergreen's claims from the FTCA's misrepresentation exception."

Over Evergreen's objections, the district court adopted the R&R, granted the motion to dismiss for lack of subject-matter jurisdiction, and denied the motion for leave to amend. Evergreen now appeals.

II.

We review *de novo* a district court's dismissal of a complaint for lack of subject-matter jurisdiction under the FTCA. *Zelaya v. United States*, 781 F.3d 1315, 1321 (11th Cir. 2015).

"[T]he United States, as a sovereign entity, is immune from suit unless it consents to be sued." *Id.* Through the FTCA, the United States has, as a general matter, "waived its immunity from tort suits based on state law tort claims." *Id.* But the United States may impose whatever conditions on its consent that it wishes. *Id.* at 1321–22. And exceptions to the general waiver of immunity "must be strictly construed in favor of the United States." *Id.* at 1322. When an exception applies, "a court will lack subject-matter jurisdiction over the action." *Id.*

As relevant here, the FTCA's exception from its waiver of sovereign immunity bars any claim "[a]rising out of . . . misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). This language includes

claims arising out of not only intentional misrepresentation but also negligent misrepresentation. *See United States v. Neustadt*, 366 U.S. 696, 710 (1961).

When we consider whether this exception applies, we must identify the true “essence” of the plaintiff’s claim, regardless of how the plaintiff may have pled her cause. *JBP Acquisitions, LP v. United States ex rel. FDIC*, 224 F.3d 1260, 1264 (11th Cir. 2000). According to the Supreme Court, “the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies.” *Block v. Neal*, 460 U.S. 289, 296 (1983). Therefore, the test we use in applying the misrepresentation exception is “whether the essence of the claim involves the government’s failure to use due care in obtaining and communicating information.” *JBP Acquisitions*, 224 F.3d at 1264. If the plaintiff’s injury “is based on the communication or miscommunication of information upon which others might be expected to rely in economic matters,” § 2680(h) applies to bar the claim. *Zelaya*, 781 F.3d at 1334. But if the plaintiff alleges injury “suffered independently of his reliance” on the misrepresentation, § 2680(h) does not apply. *Block*, 460 U.S. at 296–97.

Relying on the Supreme Court’s decision in *Block*, Evergreen maintains that the misrepresentation exception does not apply because the “NVDC breached duties distinct from communicating information.” Specifically, according to Evergreen, NVDC breached federal statutory duties: (1) to maintain an accurate index of

mortgages; and (2) to not approve the foreign transfer of a U.S. documented vessel encumbered by a mortgage.

In *Block*, the plaintiff obtained a housing loan from a federal agency to build a house in rural Tennessee. *Block*, 460 U.S. at 291. The contractor was required to comply with plans approved by the agency, which conducted three inspections throughout the project. *Id.* at 291–92. Although the agency represented that the construction met appropriate standards, it later turned out that the agency was wrong and that the house was filled with defects. *Id.* at 292. The plaintiff then sued the United States, which argued that her complaint should be dismissed based on the misrepresentation exception. *Id.* at 294.

The Supreme Court disagreed, holding that the misrepresentation exception did not apply. *Id.* at 297. While acknowledging that the plaintiff had alleged misrepresentations by the government in its inspection reports, the Court found that these misstatements were “not essential to plaintiff’s negligence claim.” *Id.* That’s because the plaintiff’s cause of action under “the Good Samaritan doctrine” did not require proof of any misrepresentation. *Id.* Rather, to prevail on her claim, the plaintiff was required to prove that she was harmed by the agency’s failure to use due care after voluntarily undertaking to supervise construction of her house. *Id.* And that claim supported damages suffered by the plaintiff that were distinct from “those attributable to [the plaintiff’s] reliance on [the agency’s] inspection reports.”

Id. The Court therefore concluded that, although there was partial overlap between a misrepresentation claim and the Good Samaritan claim, the government was not shielded from liability for the distinct negligence claim. *Id.* at 298.

“In short, if a plaintiff can show that the [g]overnment has breached a duty distinct from the duty not to make a misrepresentation and *if that breach has caused the plaintiff's injury*,” the mere fact that the government also made a misrepresentation will be insufficient to trigger the misrepresentation exception. *Zelaya*, 781 F.3d at 1336 (emphasis added). But to evade the misrepresentation exception, the plaintiff must contend that the “cause of the injury was the breach of a duty that was distinct from the duty not to miscommunicate.” *Id.*

Here, the district court correctly concluded that § 2680(h) applies to bar Evergreen’s complaint. Evergreen’s claims are squarely covered by the misrepresentation exception because “the essence of the claim[s] involves the government’s failure to use due care in obtaining and communicating information.” *JBP Acquisitions*, 224 F.3d at 1264. Evergreen’s allegations reflect that it suffered economic injuries because of a commercial decision—purchasing a vessel encumbered by a mortgage—that it may not have made had the NVDC not negligently failed to communicate the existence of the mortgage on the vessel. All injuries alleged—settlement of the mortgage, damages to the vessel as a result of the seizure, and defense costs—are attributable to that decision. In other words,

Evergreen's injuries were "based on the communication or miscommunication of information upon which others might be expected to rely in economic matters." *Zelaya*, 781 F.3d at 1334. Therefore, the misrepresentation exception applies and the government is "shielded from liability by sovereign immunity, no matter how the plaintiff may have framed his claim or articulated his theory." *Id.* at 1333.

The district court properly rejected Evergreen's attempt to analogize this case to *Block*. Unlike in *Block*, "the sufficient cause of the injury" was not "the breach of a duty that was distinct from the duty not to miscommunicate." *Id.* at 1336. Evergreen would have suffered no injury caused by the NVDC's failure to maintain accurate records absent the NVDC's communication of its inaccurate record to Evergreen. *See JBP Acquisitions*, 224 F.3d at 1265 (misrepresentation exception applied where the plaintiff "would have suffered no injury" "[w]ithout the false representation by the [g]overnment that it was the owner of the Property").

Nor has Evergreen explained how the NVDC's decision to approve transfer of the vessel to a foreign registry caused the injuries alleged. Evergreen had already purchased the vessel when the NVDC approved the foreign transfer, and it does not identify any injury attributable to that action. Even assuming the government breached these duties, therefore, Evergreen fails to show that it suffered any injury "independent[] of [its] reliance" on the misrepresentation. *Block*, 460 U.S. at 296–97. Thus, Evergreen cannot evade the misrepresentation exception because the

NVDC's failure to communicate the existence of the mortgage is "the crucial element of the chain of causation upon which [Evergreen's] claims are founded." *JBP Acquisitions*, 224 F.3d at 1265 (quotation marks omitted).

Finally, Evergreen asserts, without citing any legal authority, that the government should be estopped from raising the misrepresentation exception in this case when it did not invoke that exception against M&T Bank's related negligence claim against the United States. There are at least two problems with this argument. First, it is raised for the first time on appeal in a cursory and patently inadequate manner, so the argument is not properly before us. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority."). And second, the premise of Evergreen's contention appears to be inaccurate because the government raised the misrepresentation exception as an affirmative defense in its answer to M&T Bank's complaint.

In sum, the district court properly concluded that Evergreen's claims against the United States were barred by the FTCA's misrepresentation exception. We therefore affirm the dismissal for lack of subject-matter jurisdiction.

AFFIRMED.