

# United States Court of Federal Claims

No. 11-330C

Filed November 16, 2011

UNPUBLISHED

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**BENJAMIN CUNNINGHAM,**

*Plaintiff,*

v.

Rule 12(b)(1); subject-matter  
jurisdiction; *in forma pauperis*;  
*pro se* plaintiff.

**UNITED STATES OF AMERICA,**

*Defendant.*

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*Benjamin Cunningham, pro se.*

*Steven M. Mager*, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant.

## OPINION *and* ORDER

**Block, Judge.**

Before the court is defendant's motion to dismiss for lack of subject-matter jurisdiction, filed pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). Def.'s Mot. to Dismiss at 1, ECF No. 8. The subject of defendant's motion to dismiss is plaintiff lawsuit, fashioned as a "breach of contract" action, in which plaintiff contends that the United States has breached a contract under the United States Constitution, 42 U.S.C. § 1983, the Magistrate Acts of 1968 and 1979, and 18 U.S.C. § 4. Pl.'s Compl. at 40–42. The basis of this so-called "breach" is that Judge Deborah A. Batts, Magistrate Judge Kevin N. Fox, and numerous other defendants mishandled a lawsuit filed by plaintiff in the United States District Court for the Southern District of New York. Pl.'s Compl. at 15–29, ECF No. 1. For reasons more fully explained below, defendant's motion to dismiss for lack of subject-matter jurisdiction is **GRANTED**.

Plaintiff, as the party seeking to invoke the court's subject-matter jurisdiction, bears the burden of establishing it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182–83 (1936)); *Naskar v. United States*, 82 Fed. Cl. 319, 320 (2008) (citations omitted). When determining whether it has jurisdiction, the court accepts as true plaintiff's factual allegations made in his complaint and draws all reasonable inferences from those facts in his favor. *Erickson v. Pardus*, 551 U.S. 89,

94 (2007); *Naskar*, 82 Fed. Cl. at 320. The court affords *pro se* plaintiff particular leniency when construing his claims for relief. *Erickson*, 551 U.S. at 94 (citations omitted). The court, however, cannot stretch its leniency so far as to overlook a jurisdictional defect. *See Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995) (“The fact that [a plaintiff] act[s] *pro se* in the drafting of his complaint may explain its ambiguities, but it does not excuse its failures.”).

This burden is especially important in the United States Court of Federal Claims (the “CFC”), which is a “court of limited jurisdiction.” *Fullard v. United States*, 78 Fed. Cl. 294, 299 (2007). The CFC’s jurisdictional grant is found in the Tucker Act, which provides that the CFC “shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). Standing alone, however, the Tucker Act does not create a substantive right enforceable against the United States for monetary relief. *United States v. Testan*, 424 U.S. 392, 398 (1976); *Ferreiro v. United States*, 501 F.3d 1349, 1351 (Fed. Cir. 2007) (citing *Testan*, 424 U.S. at 398). Rather, plaintiff must establish an independent right to monetary damages based upon a money-mandating source within a contract, regulation, statute, or Constitutional provision. *Id.*

Here, plaintiff alleges that Judge Batts and Magistrate Judge Fox improperly handled his claims in the district court, even stating that they intentionally “conspired against him,” treating him wrongfully and negligently. Pl.’s Resp. at 19. As previously mentioned, plaintiff cites to the Constitution, 42 U.S.C. § 1983, the Magistrate Acts of 1968 and 1979, and 18 U.S.C. § 4. Pl.’s Compl. at 40–41; *see also* Def.’s Mot. to Dismiss at 2. Specifically, plaintiff claims that Judge Batts wrongfully dismissed his amended complaint before conducting discovery. Pl.’s Compl. at 36. In addition, plaintiff claims that Magistrate Judge Fox did not have lawful jurisdiction to preside over a summary judgment motion in district court. *Id.* at 20–23. It is not clear whether these “claims” are being asserted against Judge Batts and Magistrate Judge Fox individually, or against the United States as sovereign.

Plaintiff’s claims, regardless of the construction given to them by the court, still remain outside the court’s jurisdiction. For example, if the court construes plaintiff’s claims as a *Bivens* suit, which is an action for money damages under the Fourth Amendment, it would be outside the CFC’s jurisdiction. *Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997) (“The Tucker Act grants the Court of Federal Claims jurisdiction over suits against the United States, not against individual federal officials. Thus, the *Bivens* actions asserted by appellants lie outside the jurisdiction of the Court of Federal Claims.”). Likewise, if the court construes plaintiff’s claims against the United States, they would still be outside the court’s jurisdiction because claims of wrongful and negligent treatment sound in tort.<sup>1</sup> *Brown*, 105 F.3d at 623 (“The Court

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<sup>1</sup> District courts “have exclusive jurisdiction” over civil actions “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of

of Federal Claims . . . lacks jurisdiction over tort actions against the United States.”); *W. Mgmt., Inc. v. United States*, No. 08-116T, 2011 WL 3966147, \*10 (Fed. Cl. 2011); *Hammit v. United States*, 64 Fed. Cl. 547, 547–48 (2005); see 28 U.S.C. § 1491(a)(1) (the CFC “shall have jurisdiction to render judgment upon any claim against the United States . . . in cases not sounding in tort.”). Similarly, plaintiff’s allegations under 18 U.S.C. § 4 are not cognizable by the court because they are criminal claims, which, again, are outside the court’s jurisdiction.<sup>2</sup> *Joshua v. United States*, 17 F.3d 378, 379 (Fed. Cir. 1994) (“The [CFC] has no jurisdiction to adjudicate any claims whatsoever under the federal criminal code.”). Nor are plaintiff’s claims under 42 U.S.C. § 1983 cognizable here; “jurisdiction over such claims resides exclusively in the federal district courts.” *Hernandez*, 93 Fed. Cl. at 198.

And even if plaintiff overcame these threshold jurisdictional hurdles, he must still identify a money-mandating statute or constitutional provision as the basis of his claims. 28 U.S.C. § 1491; see *Joshua*, 17 F.3d at 379–80. While plaintiff cites to several Federal statutes and constitutional provisions, “not every claim invoking the Constitution, a federal statute, or regulation is cognizable under the Tucker Act.” *United States v. Mitchell*, 463 U.S. 206, 216 (1983). None of the Federal statutes cited by plaintiff, including the Federal Magistrate Acts of 1968 and 1979, mandate the payment of money damages. See 28 U.S.C. § 636. Nor do the constitutional provisions cited by plaintiff—Article II and the Fourth, Eighth, Ninth, and Fourteenth Amendments—mandate the payment of money damages. See *Kanarek v. United States*, 161 Ct. Cl. 37, 42 (1963) (holding Article II is not money-mandating); *Hernandez v. United States*, 93 Fed. Cl. 193, 197–99 (2010) (holding the Fourth, Eighth, Ninth, and Fourteenth amendments are not money-mandating). Nor does *Bivens* provide a money-mandating basis for plaintiff’s relief here because, as discussed above, *Bivens* applies only to suits against individual officers, not the United States as sovereign. *Brown*, 105 F.3d at 624 (citing *Bivens*, 403 U.S. 388). Without a money-mandating basis, the court lacks subject-matter jurisdiction over his claims. Having determined that the court lacks subject-matter jurisdiction, plaintiff’s claims must be dismissed. RCFC 12(h)(3).

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his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b).

<sup>2</sup> Plaintiff alleges that the judges violated a New York state traffic law by conspiring to conceal plaintiff’s injuries from the aforementioned bus accident. Pl.’s Resp. at 4, 15–19. Plaintiff claims that by conspiring to conceal the accident, the judges violated 18 U.S.C. § 4, which criminalizes the concealment of a federal crime. *Id.* Even if the court did possess jurisdiction over criminal claims, 18 U.S.C. § 4 does not criminalize a violation of a New York state traffic law, but rather only “[felonies] cognizable by a court of the United States,” and therefore, the statute, even if it was within this court’s subject-matter jurisdiction, would remain an invalid basis for plaintiff’s claim.

For the foregoing reasons, defendant's motion to dismiss for lack of subject-matter jurisdiction is **GRANTED**. The Clerk is directed to take the necessary steps to dismiss this matter.

**IT IS SO ORDERED.**

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**Lawrence J. Block**  
**Judge**