

In the United States Court of Federal Claims

No. 10-26 C

(Filed: June 7, 2010)

)	
KENNETH BOWLING,)	
)	
Plaintiff,)	Pro Se Claim for Damages for
)	Injuries Incurred During Work at
v.)	the Navy Public Works Center;
)	No Jurisdiction for Claim Based
)	on Tort Theory of Negligence
THE UNITED STATES,)	
)	
Defendant.)	
)	

Kenneth Bowling, Ontario, OR, pro se.

Vincent D. Phillips, with whom were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. _____

OPINION AND ORDER

HEWITT, Chief Judge

Following surgery for lung cancer, Kenneth Bowling (plaintiff or Mr. Bowling) filed a Complaint (Complaint or Compl.) against the United States (defendant or United States) on January 13, 2010, in which he asserts that he is entitled to relief as a result of defendant’s gross negligence in exposing him to roofing materials containing asbestos during the course of his employment with the Navy Public Works Center (PWC).

I. Background

Before the court are plaintiff’s Complaint; Defendant’s Motion to Dismiss (defendant’s Motion or Def.’s Mot.), Docket Number (Dkt. No.) 7, filed February 23, 2010; Plaintiff’s “Motion of Argument to Defendant’s Motion to Dismiss” (plaintiff’s

Response or Pl.'s Resp.), Dkt. No. 11, filed March 17, 2010; and Defendant's Reply in Support of Its Motion to Dismiss (defendant's Reply or Def.'s Reply), Dkt. No. 14, filed April 5, 2010. The United States asserts that plaintiff's Complaint must be dismissed in its entirety for lack of subject matter jurisdiction. Def.'s Mot. 1. Mr. Bowling asserts that three federal statutes provide him with a basis for relief and confer subject matter jurisdiction on the United States Court of Federal Claims (CFC): (1) the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680 (2006); (2) the Federal Employee Compensation Act (FECA), 5 U.S.C. §§ 8101-8193 (2006); and (3) the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (2006). Pl.'s Resp. 1-4. Alternatively, plaintiff requests that the court transfer his case should it lack subject matter jurisdiction. Pl.'s Resp. 8.

Also before the court are Plaintiff's "Motion to Request Leave from the Court for Amended Claim Petition" (plaintiff's Motion or Pl.'s Mot.), Dkt. No. 18, filed April 26, 2010; and Defendant's Response in Opposition to Motion for Leave to Amend Complaint (defendant's Response or Def.'s Resp.), Dkt. No. 19, filed May 13, 2010. The court considers whether a grant of plaintiff's Motion would affect the outcome of the case. Because the court concludes that it lacks subject matter jurisdiction for the reasons stated below, the proposed amendment will not affect the outcome of the case. Plaintiff's Motion is therefore DENIED.

In 1977, PWC employed Mr. Bowling in San Diego, California. Compl. 3; Def.'s Mot. 1. Mr. Bowling asserts that during the course of his employment at PWC, he used roofing products manufactured by Johns Manville Corporation that contained asbestos and lacked proper warnings. Compl. 1, 3; Def.'s Mot. 1-2. Further, Mr. Bowling asserts that PWC failed to follow proper safety measures as required by OSHA. Compl. 3; Def.'s Mot. 1. Mr. Bowling subsequently worked for other roofing entities but asserts that these employers complied with OSHA regulations and therefore could not be responsible for his lung damage. Compl. 4; see Def.'s Mot. 1-2. In December of 2007, Mr. Bowling underwent surgery for lung cancer, which, he asserts, he developed as a result of asbestos exposure during his employment at PWC. Compl. 3, 5-6. Mr. Bowling seeks damages from PWC for his complete and permanent disability resulting from asbestos exposure. Compl. 4. Mr. Bowling also seeks ten million dollars from Johns Manville Corporation.¹ Pl.'s Resp. 7.

¹ Plaintiff's "Motion of Argument to Defendant's Motion to Dismiss" (plaintiff's Response or Pl.'s Resp.) states--in explanation of the ten million dollars he seeks in damages--that "this is a suit of three times damages sought, for inflation, cost of home care, lung transplant (x2), mech[anical] lung (new 2008), before, dur[ing], or after transplant of lungs if needed. Pain and suffering as result of injury." Pl.'s Resp. 7.

II. Legal Standards

A. Subject Matter Jurisdiction

Because subject matter jurisdiction is a threshold matter, it must be established before the case can proceed on the merits. Steel Co. v. Citizens for a Better Env't (Steel Co.), 523 U.S. 83, 94-95 (1998); PODS, Inc. v. Porta Stor, Inc., 484 F.3d 1359, 1365 (Fed. Cir. 2007). Plaintiff bears the burden of establishing subject matter jurisdiction, and the court may determine whether he has met this burden once he has had an opportunity to be heard on the matter. Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988) (citing Zunamon v. Brown, 418 F.2d 883, 886 (8th Cir. 1969)).² If the court determines that it lacks subject matter jurisdiction, it must dismiss the claim. Steel Co., 523 U.S. at 94; Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); Rules of the United States Court of Federal Claims (RCFC) 12(h)(3).

The jurisdiction of the CFC is set forth in the Tucker Act, 28 U.S.C. § 1491 (2006). The Tucker Act provides that the CFC has jurisdiction to hear claims against the United States founded upon “any Act of Congress or any regulation of an executive department . . . for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1) (emphasis added). Therefore, the CFC lacks the authority to hear tort claims against the United States because the Tucker Act expressly excludes such claims from the jurisdiction of the court. See Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997) (citing 28 U.S.C. § 1491(a) and Keene Corp. v. United States, 508 U.S. 200, 214 (1993)); see, e.g., Souders v. S.C. Pub. Serv. Auth. (Souders), 497 F.3d 1303, 1307 & n.5 (Fed. Cir. 2007) (holding that plaintiff’s negligence claims sounded in tort and thus were beyond the jurisdiction of the CFC and could not be transferred there); Moore v. Durango Jail (Moore), 77 Fed. Cl. 92, 96 (2007) (holding that the CFC did not have jurisdiction over plaintiff’s claim because “plaintiff’s claim of negligence sounds in tort”).

Further, the CFC has jurisdiction only over claims against the United States. 28 U.S.C. § 1491(a)(1); see United States v. King, 395 U.S. 1, 2-3 (1969) (stating that the jurisdiction of the CFC “has been limited to money claims against the United States [g]overnment” since Congress created the court in 1855); RCFC 10(a) (stating that the title of the complaint must designate the United States as defendant); see also RCFC 4

² Complaints filed by pro se plaintiffs are generally held to “less stringent standards than formal pleadings drafted by lawyers.” Haines v. Kerner, 404 U.S. 519, 520 (1972). Nonetheless, pro se plaintiffs must meet jurisdictional requirements. Bernard v. United States, 59 Fed. Cl. 497, 499, aff’d, 98 Fed. App’x 860 (Fed. Cir. 2004) (unpublished decision).

rules committee note (2002 rev.) (stating that “only the United States is properly the named defendant”).

The proper forum for federal tort claims is a United States district court. 28 U.S.C. § 1346(b)(1) (2006). Under 28 U.S.C. § 1346(b)(1), United States district courts have exclusive jurisdiction to hear tort claims against the United States, including all FTCA claims. See id. However, before an FTCA claim may proceed in a district court, the claimant must first present his claim to the appropriate federal agency. 28 U.S.C. § 2675(a). Only after the appropriate agency issues a final decision denying an FTCA claim may it be brought in a United States district court. Id.

B. Transfer for Lack of Subject Matter Jurisdiction

Under 28 U.S.C. § 1631 (2006), a federal court may transfer a case to another federal court when (1) the transferring court lacks subject matter jurisdiction; (2) the case could have been brought in the transferee court at the time it was filed; and (3) such a transfer is in the interest of justice. 28 U.S.C. § 1631; see Rodriguez v. United States, 862 F.2d 1558, 1559-60 (Fed. Cir. 1988). An FTCA claim could have been brought in a federal court only if administrative remedies were exhausted at the time the case was filed. 28 U.S.C. § 2675(a).

III. Application of Legal Standards to This Case

For the following reasons, this court finds that it lacks subject matter jurisdiction over all of Mr. Bowling’s claims. Additionally, it finds that transfer of Mr. Bowling’s case to another federal court of the United States is not appropriate.

A. This Court Lacks Subject Matter Jurisdiction over Mr. Bowling’s Claims

Neither plaintiff’s Complaint nor his Response establishes that his claim falls within this court’s subject matter jurisdiction as defined by the Tucker Act. See Compl. passim; Pl.’s Resp. passim. In particular, the court finds that it lacks subject matter jurisdiction for three reasons.

First, Mr. Bowling’s claim against the United States sounds in tort. See Compl. passim. Mr. Bowling titles his Complaint “Tort Claim,” and seeks damages for personal injuries resulting from alleged negligence. Id. at 1, 3. As a general matter, negligence claims are tort claims. See Souders, 497 F.3d at 1307 & n.5 (stating that negligence claims fall within the broader category of tort claims); Moore, 77 Fed. Cl. at 96 (categorizing a negligence claim as one sounding in tort). This places Mr. Bowling’s

claim beyond the scope of this court's jurisdiction because this court may only hear cases that do not sound in tort. See 28 U.S.C. § 1491(a)(1).

Second, although Mr. Bowling asserts that each of FTCA, FECA, and OSHA provides a separate basis of subject matter jurisdiction for his claim against the United States, he is mistaken in this belief. See Pl.'s Resp. 1-4. While these federal statutes provide federal remedies, they do not expand the jurisdiction of this court or allow the court to hear Mr. Bowling's claim.

The FTCA is subject to 28 U.S.C. § 1346(b)(1), which gives United States district courts exclusive jurisdiction over tort claims against the government. See 28 U.S.C. § 1346(b)(1). While the FTCA provides a waiver of the United States' sovereign immunity in negligence cases such Mr. Bowling's, the waiver applies only in federal district court. See 28 U.S.C. §§ 1346(b)(1), 2674. The United States argues that Mr. Bowling's claim must be dismissed because jurisdiction over FTCA claims does not extend to the CFC, where Mr. Bowling has brought his claim. Def.'s Reply 2. Mr. Bowling's assertion that the FTCA extends jurisdiction to the CFC, see Pl.'s Resp. 1-2, is incorrect. The CFC has no subject matter jurisdiction over tort claims and therefore is unable to offer relief to Mr. Bowling under the FTCA.

Further, the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), exempts the government from liability on FTCA claims based on the failure of either a government employee or a federal agency to perform a discretionary duty. 28 U.S.C. § 2680(a). Mr. Bowling asserts that the discretionary function exception to the FTCA provides him with a basis for relief because it makes compliance with OSHA regulations mandatory rather than discretionary. Pl.'s Resp. 5-6. However, as defendant's Reply underscores, Mr. Bowling's reliance on the discretionary function exception is misplaced because the provision has no relationship to OSHA and in fact precludes relief under the FTCA in certain instances in federal district courts by revoking the sovereign immunity waiver. Def.'s Reply 3 (citing Pl.'s Resp. 2). Mr. Bowling's reading of 28 U.S.C. § 2680(a) is incorrect. The provision does not provide him with a basis for recovery. Mr. Bowling can obtain relief under FTCA only if he first presents his claim to the appropriate federal agency and exhausts the available administrative remedies. See 28 U.S.C. § 2675(a). If the agency issues a final decision denying his claim, he may then bring his claim in a United States district court under 28 U.S.C. § 1346(b)(1).

Similarly, FECA does not expand this court's jurisdiction to encompass Mr. Bowling's claim. FECA provides for employee compensation in the event of disability or death caused by injuries sustained in the course of job performance. 5 U.S.C. § 8102. If an employee of the United States seeks such compensation under FECA, the remedy is exclusive and bars any recovery against the United States in a judicial proceeding. 5

U.S.C. § 8116(c). FECA claims are made to and administered by the office of the Secretary of Labor. 5 U.S.C. § 8121.

Nevertheless, Mr. Bowling asserts that FECA provides a basis of subject matter jurisdiction. Pl.'s Resp. 2. The United States states, correctly, that FECA precludes recovery under federal tort statutes in federal courts when it applies. Def.'s Reply 4 (citing Metz v. United States, 723 F. Supp 1133, 1135-36 (D. Md. 1989)); see 5 U.S.C. § 8116(c) (stating liability of the United States under 5 U.S.C. §§ 8101-8193 with respect to employee's injury or death is exclusive and in place of all other liability). If Mr. Bowling has a valid claim under FECA, he must present it to the Secretary of Labor and is thereby precluded from any remedy in federal court. See 5 U.S.C. §§ 8101-8193. Regardless of whether Mr. Bowling has a valid FECA claim, this court has no authority to hear or administer FECA claims.

Much like FECA, OSHA provides a framework for remedies claimed and enforced through the office of the Secretary of Labor. See 29 U.S.C. § 651-678. Employers are required to comply with the standards set out in OSHA and to furnish employees with a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Id. § 654(a). The Secretary of Labor investigates alleged OSHA violations as they are reported. Id. § 657(f). After an investigation, employers may be assessed a penalty for failure to correct noncompliant behavior within the specified time. Id. § 659(b). Mr. Bowling asserts that OSHA confers on the CFC the necessary subject matter jurisdiction to hear his claim. See Pl.'s Resp. 2, 3-4. The United States replies, correctly, that OSHA does not provide this court with authority to hear Mr. Bowling's claim based on violations of the act. See Def.'s Reply 5-6. Such violations are properly reported to the office of the Secretary of Labor in accordance with the procedure for reporting an OSHA violation outlined in the statute. See 29 U.S.C. § 651-678. This court has no jurisdiction over OSHA claims.

Third, Mr. Bowling's claim against Johns Manville Corporation for ten million dollars in damages, see Compl. 1; Pl.'s Resp. 2-3, 6-7, is beyond the jurisdiction of this court. The Tucker Act limits the jurisdiction of the CFC to claims against the government for money. 28 U.S.C. § 1491(a)(1); see King, 395 U.S. at 2-3. Johns Manville is a Berkshire Hathaway company, not a government entity. See Johns Manville Home Page, <http://www.jm.com> (last visited May 27, 2010). Further, Mr. Bowling asserts that Johns Manville was negligent because the company failed to place warning labels on a roll roofing product it produced, which Mr. Bowling used in the course of his employment at PWC. See Compl. 3. Because negligence claims are a type of tort claim, Mr. Bowling's claim against Johns Manville is one sounding in tort. See Souders, 497 F.3d at 1307 & n.5 (stating that negligence claims fall within the broader category of tort claims); Moore, 77 Fed. Cl. at 96 (categorizing a negligence claim as one sounding in tort). This court has

no jurisdiction over claims sounding in tort. 28 U.S.C. § 1491(a)(1). Mr. Bowling's claim against Johns Manville therefore falls outside the scope of jurisdiction of the CFC.

B. Transfer of the Case to Another Court Is Not Appropriate

Although this court lacks jurisdiction over Mr. Bowling's claim against the United States, it may not transfer this claim to a United States district court because Mr. Bowling could not have brought this case in a district court at the time it was filed.

The exclusive jurisdiction of the district courts over tort claims against the United States extends only to FTCA claims that were first presented to the appropriate federal agency. 28 U.S.C. § 2675(a). Mr. Bowling asserts that this court should transfer his claim to a proper jurisdiction if transfer is needed. Pl.'s Resp. 8. The United States replies that transfer is inappropriate because Mr. Bowling has failed to show that he pursued his claim with any administrative agency as required under 28 U.S.C. § 2675(a). Def.'s Mot. 3-4; Def.'s Reply 6. Mr. Bowling fails to address this matter in his Complaint and Response and has failed to provide any basis for concluding that he has pursued his claim with the appropriate agency and exhausted available administrative remedies. See Compl. passim; Pl.'s Resp. passim.

Therefore, at the time plaintiff's Complaint was filed, Mr. Bowling's claim against the United States could not have been brought in a United States district court because he failed to show that he first pursued any administrative remedies. Accordingly, this court may not transfer Mr. Bowling's claim against the United States to a district court. Cf. 28 U.S.C. § 1631 (allowing transfer only to a court in which case "could have been brought"). The court does not consider whether, if the claim had been pursued with the appropriate agency, transfer would be in the interest of justice. Further, because United States district courts have exclusive jurisdiction over tort claims against the government, no other forum exists to which this claim could be transferred.

This court also has no jurisdiction over Mr. Bowling's claim against Johns Manville Corporation because the CFC has no jurisdiction over claims against private parties. See 28 U.S.C. § 1491(a)(1); King, 395 U.S. at 2-3. Accordingly, the court has considered whether it could transfer Mr. Bowling's claim against Johns Manville Corporation to another federal court. 28 U.S.C. § 1631 (granting a federal court authority to transfer a case to another federal court in certain circumstances; see 28 U.S.C. § 610 (defining "courts"); cf. Tex. Peanut Farmers v. United States, 409 F.3d 1370, 1374-75 (Fed. Cir. 2005) (stating that the CFC should have considered whether transfer was appropriate once the court determined that it lacked jurisdiction). As discussed below, the court has not been able to identify a claim that is cognizable in federal court that would afford Mr. Bowling the relief he seeks against Johns Manville Corporation in the

complaint. See Compl. 3 (stating the cause for complaint against Johns Manville Corporation as a lack of warning labels on a particular roofing product produced by the company).

The court first considers whether Mr. Bowling has a claim against Johns Manville Corporation under federal law. The Environmental Protection Agency (EPA) regulates asbestos according to the framework provided by the Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. §§ 2601-2692 (2006); see EPA Asbestos Home Page, <http://www.epa.gov/asbestos> (last visited May 27, 2010). TSCA provides the EPA Administrator with authority to prohibit manufacture, processing or distribution of, or otherwise to regulate, any substance that he determines poses “an unreasonable risk of injury to health or the environment.” 15 U.S.C. § 2605(a). As a general matter, any person who violates a rule promulgated under section 2605(a) becomes liable to the United States, not to a private party. See id. §§ 2614-2615. However, TSCA includes a citizen suit provision allowing a person to bring a civil suit in a United States district court against any person, the United States, or any government agency that is alleged to be in violation of TSCA or rules promulgated under TSCA. Id. § 2619(a). Nonetheless, this provision does not provide Mr. Bowling with a federal claim against Johns Manville Corporation that would allow this court to transfer his personal injury claim to a district court under 28 U.S.C. § 1631.

First, Mr. Bowling does not allege that Johns Manville violated TSCA, nor does he point to any rule promulgated under TSCA that would have required Johns Manville Corporation to place certain warning labels on its roofing product. See Compl. passim; Pl.’s Resp. passim. Second, the citizen suit provision of TSCA is not intended for personal injury claims. See 15 U.S.C. § 2619(a)(1) (stating that under this section, any person may commence a civil action against any other person, the United States or a governmental agency alleged to be in violation of the TSCA or any rules promulgated under the TSCA to restrain such violation). Finally, even if Mr. Bowling did have a legitimate claim under TSCA, the claim could only have been brought in a district court if Mr. Bowling had first given sixty days’ prior notice of the violation to the EPA Administrator and the party alleged to be in violation. See id. § 2619(b)(1)(A). Mr. Bowling gives no indication that such notice was given. See Compl. passim; Pl.’s Resp. passim. For these reasons, Mr. Bowling’s claim against Johns Manville Corporation could not have been brought under TSCA in a United States district court at the time he filed his Complaint. See 15 U.S.C. § 2619(b). This court, therefore, lacks the authority to transfer any claims Mr. Bowling might have under TSCA against Johns Manville Corporation. See 28 U.S.C. § 1631.

Three other federal statutes regulate asbestos: (1) the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671 (2006), (2) the Comprehensive Environmental Response,

Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2006), and (3) the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2006). However, each of these statutes is intended to address environmental harm rather than personal injury claims. For instance, the CAA allows any person to bring suit for the enforcement of emission standards or limitations, see 42 U.S.C. § 7604(a), including those that relate to asbestos, see id. § 7412(a)(6), (b) (including asbestos in the definition of “hazardous air pollutant”). Similarly, CERCLA provides for the clean-up costs of hazardous substances, including asbestos, that are released during transport, disposal or treatment. See id. § 9607(a) (allowing for recovery of such costs incurred in accordance with the national contingency plan); EPA Designation of Hazardous Substances, 40 C.F.R. § 302.4 (2009) (listing asbestos as a hazardous substance). The CWA, likewise, provides a framework for “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the [n]ation’s waters,” in part by eliminating the discharge of pollutants into navigable waters. See 33 U.S.C. §§ 1251(a), 1362(6) (defining “pollutant”). Because none of these statutes provides a private right of action for personal injury claims, none of them provides this court with a basis for transferring Mr. Bowling’s personal injury claim against Johns Manville Corporation. See 28 U.S.C. § 1631 (allowing transfer only if the case could have been brought in the transferee court at the time the Complaint was filed).

Finally, the court finds inadequate grounds in plaintiff’s Complaint for concluding that Mr. Bowling has met the requirements for bringing any state claim that he may have against Johns Manville Corporation in a diversity action in federal court. See Compl. passim; 28 U.S.C. § 1332(a) (2006) (providing for diversity jurisdiction in federal court when certain conditions are met); see also John Birch Soc’y v. Nat’l Broad. Co., 377 F.2d 194, 197 (2d Cir. 1967) (stating that “diversity of citizenship must be apparent from the pleadings” in cases based on diversity jurisdiction). Therefore, transfer of Mr. Bowling’s claim against Johns Manville Corporation to another federal court on the basis of diversity jurisdiction is inappropriate. See 28 U.S.C. §§ 610, 1631. The court lacks authority to transfer Mr. Bowling’s claim against Johns Manville Corporation to a state court. Id.

IV. Other Pending Motions

Mr. Bowling filed a “Limited Discovery Request” (plaintiff’s Discovery Motion) and a “Motion in Support of; Expansion of; Limited Discovery Request” (plaintiff’s Second Discovery Motion). Because this court lacks jurisdiction over Mr. Bowling’s case, plaintiff’s Discovery Motion and Second Discovery Motion are MOOT.

V. Conclusion

For the foregoing reasons, defendant's Motion to Dismiss is GRANTED. The court also DENIES as MOOT all other pending motions. The Clerk of Court shall ENTER JUDGMENT in favor of defendant United States. No costs.

IT IS SO ORDERED.

EMILY C. HEWITT
Chief Judge