

In the United States Court of Federal Claims

No. 10-43C
(Filed June 7, 2010)

(NOT TO BE PUBLISHED)

VICTOR DEL RIO,)
)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES,)
)
 Defendant.)

Victor Del Rio, *pro se*, Spring, TX.

P. Davis Oliver, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Judge.

Victor Del Rio filed a complaint on January 21, 2010, that primarily seeks relief in the form of a writ of mandamus from a judgment of the 311th District Family Court of Harris County, Texas. Compl. ¶¶ 44b, 65-66, 109, 113. In addition, Mr. Del Rio seeks the return of firearms that allegedly have been confiscated from him. Compl. ¶ 113. The government has moved to dismiss the complaint pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims (“RCFC”) on the ground that this court lacks subject matter jurisdiction over Mr. Del Rio’s claims. Def. Mot. to Dismiss at 1.

BACKGROUND

Mr. Del Rio asserts that his constitutional rights and those of his son have been violated because his wife, who received sole custody of the son, is “extremely indifferent” towards the child. Compl. ¶ 109b (capital letters omitted). Mr. Del Rio maintains that he “is the only

person[] showing any concern for the safety and welfare” of his son and that he has been subjected to cruel and unusual punishment as a consequence of his inability to secure custody of the child. *Id.* (capital letters omitted). Mr. Del Rio also claims that previous decisions of Texas state courts and of this court, considered together with actions taken by Texas state officials, are the result of “a classified ‘protocol’” that amounts to a bill of attainder. *Id.* Mr. Del Rio previously brought an almost identical lawsuit in this court, which was dismissed for lack of subject matter jurisdiction because Mr. Del Rio failed to state a cognizable claim for money damages against the United States or any of its agents. *Del Rio v. United States*, 87 Fed. Cl. 536 (2009) (“*Del Rio I*”).

JURISDICTION

“Jurisdiction must be established as a threshold matter before the court may proceed with the merits of this . . . action.” *OTI Am., Inc. v. United States*, 68 Fed. Cl. 108, 113 (2005) (citation omitted). Mr. Del Rio bears the burden of establishing that this court has jurisdiction over his claims. *See McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). Plaintiffs such as Mr. Del Rio who are appearing *pro se* are held to a less stringent pleading standard than those represented by counsel. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). This leniency, however, does not absolve *pro se* plaintiffs of their burden to establish jurisdiction. *See Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995) (“The fact that [plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, but it does not excuse its failures, if such there be.”). In addressing a motion to dismiss, this court “must accept as true the facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff.” *Goel v. United States*, 62 Fed. Cl. 804, 806 (2004) (citing *Henke*, 60 F.3d at 797). However, the court is “not bound to accept as true a legal conclusion couched as a factual allegation,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papsan v. Allain*, 478 U.S. 265, 286 (1986)), nor is it required to give credence to implausible allegations. *See Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949 (2009) (stating that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). If the court determines that it lacks subject matter jurisdiction, it must either dismiss the case, *see Thoen v. United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985), or transfer it to a federal court that would have jurisdiction. *See Travelers Indem. Co. v. United States*, 72 Fed. Cl. 56, 59-60 (2006).

The Tucker Act grants this court “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). To invoke the Tucker Act, Mr. Del Rio must identify a constitutional or statutory right that is both enforceable against the United States and would entitle him to money damages. *See United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) (stating that the source of a claim must stem from a provision of substantive law that can be interpreted as money-mandating).

Mr. Del Rio nominally asserts a claim against the United States, presumably to comply with the requirement specified in *Del Rio I* that “[i]n this court the only proper defendant is the United States.” 87 Fed. Cl. at 539. Nevertheless, after examination, none of Mr. Del Rio’s allegations actually concern the federal government. For example, Mr. Del Rio seeks relief from various judgments entered by Texas courts, *see* Compl. ¶¶ 109, 113, over which this court has no juridical power. *See Del Rio I*, 87 Fed. Cl. at 539; *Shalhoub v. United States*, 75 Fed. Cl. 584, 585 (2007). Other named defendants include private individuals, such as Tracey Del Rio, and state officials, none of whom are proper defendants in this court. *See Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997) (stating that this court does not have jurisdiction over claims against individual officers).

Mr. Del Rio additionally fails to identify an appropriate money-mandating statute as the basis for his claims. His complaint lists a number of statutes, constitutional provisions, and uniform laws, including the Patriot Act and the Texas Constitution, as supportive of his averments and claims for relief. *See* Compl. ¶¶ 1-44c. However, Mr. Del Rio’s listing is unavailing. The Texas Constitution cannot constitute basis for a claim against the United States because it cannot “fairly be interpreted as mandating compensation by the [f]ederal [g]overnment for the damages sustained.” *Mitchell*, 463 U.S. at 217. Similarly, courts have consistently found that the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution are not money-mandating. *See Del Rio I*, 87 Fed. Cl. at 539 (citing relevant precedents for the proposition that the Fourth, Fifth, and Fourteenth Amendments are not money mandating); *Trafny v. United States*, 503 F.3d 1339, 1340 (Fed. Cir. 2007) (“The Court of Federal Claims does not have jurisdiction over claims arising under the Eighth Amendment.”). The Ninth Amendment also provides no cognizable right to relief for an individual such as Mr. Del Rio. *See Patterson v. United States*, 218 Fed. Appx. 987, 988 (Fed. Cir. 2007) (“[A] claim for monetary damages against the United States cannot be based on the . . . Ninth . . . Amendment.”); *Zhao v. United States*, 91 Fed. Cl. 95, 99 & n.4 (2010) (same); *see also Showengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991) (The “[N]inth [A]mendment . . . has not been interpreted as independently securing any constitutional rights for making out a constitutional violation.”). Correlatively, the numerous statutory provisions cited by Mr. Del Rio all sound in tort and are accordingly improper bases for claims made in this court. *See Schillinger v. United States*, 155 U.S. 163, 169 (1894) (“Cases sounding in tort are not cognizable in the court of claims.”). In addition, the primary relief sought by Mr. Del Rio consists of a writ of mandamus, which district courts, not this court, have power to issue. *See* 28 U.S.C. § 1361 (district courts have “original jurisdiction of any action in the nature of mandamus”); *Del Rio I*, 87 Fed. Cl. at 540 (“The Court of Federal Claims lacks jurisdiction to hear mandamus petitions.”).¹ Therefore, this court does not possess the authority to hear Mr. Del Rio’s claims or to provide the relief he requests.

¹However, this court does have juridical power to award relief similar to a writ of mandamus “as an incident of and collateral to any such [money] judgment,” 28 U.S.C. § 1491(a)(2), in the form of “orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records.” *Id.*

CONCLUSION

For the reasons stated above, the government's motion to dismiss is GRANTED, and this case shall be dismissed for lack of subject matter jurisdiction. The Clerk shall enter judgment accordingly.

No costs.

It is so ORDERED. _____

Charles F. Lettow
Judge