In the United States Court of Federal Claims

Nos. 11-110C, 11-127C
(Filed: April 8, 2011)
NOT FOR PUBLICATION

ERIC FLORES, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Nos. 11-110C & 11-127C

Eric Flores, Cynthia Lorenza Flores, Javier Vensor Flores Sr., Andy Flores, Steven Flores, Micheal Rene Flores, Evangelina Salas Mendoza, and Jorge Salas, El Paso, Texas, plaintiffs *pro se*.

Luke A. E. Pazicky, Trial Attorney, Deborah A. Bynum, Assistant Director, Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, Tony West, Assistant Attorney General, Department of Justice, Washington, D.C., for defendant.

OPINION AND ORDER DISMISSING CONSOLIDATED ACTIONS *SUA SPONTE*

GEORGE W. MILLER, Judge

Plaintiffs initiated their first case in this court by filing a complaint on February 22, 2011, *Eric Flores, et al. v. United States*, No. 11-110C (docket entry 1) ("*Flores I*"). They subsequently initiated another case by filing a second complaint on February 28, 2011, *Eric Flores, et al. v. United States*, No. 11-127C (docket entry 1) ("*Flores II*").[1] In both actions plaintiffs seek to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a)(1).[2] For the

[1] *Flores I* was initially assigned to the undersigned, and *Flores II* was assigned to the Honorable Lynn J. Bush. Pursuant to Rule 40.1(b) of the Rules of the Court of Federal Claims ("RCFC"), Judge Bush issued an order transferring *Flores II* to the undersigned because that case was substantially related to *Flores I* (*Flores II* docket entry 7, Mar. 18, 2011).

[2] Section 1915(a)(1) states that any federal court may authorize a civil action to proceed without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets *such prisoner possesses*" and attests "that the person is unable to pay such fees." (emphasis added). Although this language seemingly could limit § 1915(a)(1) to prisoners,

purpose of addressing whether the Court has jurisdiction over plaintiffs' complaints and whether plaintiffs' claims are frivolous, the Court **GRANTS** plaintiffs' motions to proceed *in forma pauperis*. For the reasons explained below, the Court consolidates the two cases and *sua sponte* dismisses both of plaintiffs' actions for lack of jurisdiction and because plaintiffs' claims are frivolous.

I. Background[3]

A. Flores I

In *Flores I*, plaintiffs base their claims on the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), and the allegation that

> persons of another nation whom have freelanced [sic] executive employees of the federal government . . . to conduct a genetic study on private minority citizens . . . by useing [sic] advanced technology with a direct signal to the satelite [sic] in outerspace [sic] that has the capability of calculateing [sic] a genetic code to inflict . . . different types of genetic virisus [sic] causeing [sic] severe pain . . . which was equivalent in intensity to organ failure, impairment of body functions, and death.

Compl. at 3, 9. In turn, each plaintiff describes his or her most significant symptoms caused by the alleged genetic manipulation, the most common of which include interference with heart functions resulting in heart attacks, disruption of plaintiffs' mental state compelling them to take controlled substances, the formation of "combustion in [their] lower abdominal region resulting in . . . defecateing [sic] blood during . . . bow [sic] movements," and the death of plaintiff Jorge Salas. Compl. at 10-23.

For relief, plaintiffs request that the Court: (1) direct the clerk of court to send copies of the questions of law as set forth in plaintiffs' complaint to the United States Attorney General; (2) issue an order to show cause why the United States is causing plaintiffs to experience severe pain; (3) determine whether the employees harming plaintiffs are acting within the scope of their official duties and whether they may be liable in their individual capacity; (4) order the United

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courts have held that § 1915(a)(1) allows both prisoner and non-prisoner litigants to proceed *in forma pauperis*. *Haynes v. Scott*, 116 F.3d 137, 139-40 (5th Cir. 1997) (holding that the statute applies to all applicants, including non-prisoners, but prisoners must meet the additional requirements of § 1915(a)(2)); *Floyd v. U.S. Postal Serv.*, 105 F.3d 274, 276 (6th Cir. 1997) (observing that the statute's use of the word "person"—not prisoner—indicates that all persons are permitted to seek leave to file *in forma pauperis*); *see also Moore v. United States*, 93 Fed. Cl. 411, 412 n.1 (2010).

[3] The following recitation does not constitute findings of fact by the Court. Instead, the background is taken from plaintiffs' complaints in order for the Court to determine whether plaintiffs have alleged sufficient facts to show that the Court has jurisdiction over their claims. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

States Attorney General to serve a certified copy of the complaint on "the executive official of the [Texas] governor's office"; and (5) certify this case as a class action.[4] Compl. at 26-27, 30.

In addition, plaintiffs contend that the Court will engage in *ex parte* communication with members of the federal government, which will deprive plaintiffs of equal protection of the law. Compl. at 30. Specifically, plaintiffs argue that the Government will attempt to portray plaintiffs' claims as frivolous in order to prevent a judicial investigation of their claims. Compl. at 30. Plaintiffs claim that this will result in a deprivation of due process, which will cause "wrongful death by torture." Compl. at 34.

B. Flores II

In plaintiffs' second complaint, they seek "to complain against a Public Health Service covered entity named Sierra Medical Center" for damages that resulted from Sierra Medical Center's alleged refusal "to permit inspection or judicial review of protected health information that would satisfy the burden of proveing [sic] that each member of this class" had sought medical attention for the injuries that resulted from the torture described in *Flores I*. Compl. at 3. Plaintiffs acknowledge that *Flores I* is a related case that involves common questions of fact and law. Compl. at 4. In addition, plaintiffs claim that Sierra Medical Center failed to provide adequate medical care in violation of the Eighth and Fourteenth Amendments. Compl. at 6.

In *Flores II*, plaintiffs seek an order directing Sierra Medical Center to permit inspection or judicial review of plaintiffs' medical records, and seek to hold Sierra Medical Center liable for the serious harm and suffering that plaintiffs contend resulted from the Center's refusal to release such records. Compl. at 7. Plaintiffs also seek an order directing the Secretary of Health and Human Services to gather plaintiffs' medical records. Compl. at 37.

II. Standard of Review

"Jurisdiction must be established as a threshold matter before the court may proceed with the merits of this or any other action." *OTI Am., Inc. v. United States*, 68 Fed. Cl. 108, 113 (2005) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998)). Plaintiffs bear the burden of demonstrating that the Court has jurisdiction over their claims. *See Biddulph v. United States*, 74 Fed. Cl. 765, 767 (2006). *Pro se* plaintiffs are entitled to liberal construction of their pleadings, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), which will be interpreted in the

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[4] Plaintiff Eric Flores seeks to act as "class counsel," Compl. at 27, but also states in the complaint,

> "The plaintiff believes that after the appropriate prosecuteing [sic] authorities take the time to help each member of this class action understand that the severe pain described . . . is a result of being tortured, it is at that point . . . that each member . . . will began [sic] to more frequently complain against torture or adjoin the plaintiff Eric Flores . . . on their own behalf."

Compl. at 29. Plaintiff Eric Flores then states that he notified each listed plaintiff and none of them objected to the case being maintained as a class action. *Id.*

light most favorable to plaintiffs. *Baker v. United States*, 74 Fed. Cl. 421, 421 (2006). But like all plaintiffs, *pro se* plaintiffs must meet jurisdictional requirements in order for the Court to hear their case. *Biddulph*, 74 Fed. Cl. at 767 ("*Pro se* status does not immunize a plaintiff from meeting jurisdictional requirements."); *see also Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987).

The Court's subject matter jurisdiction is delineated in the Tucker Act, 28 U.S.C. § 1491, and extends to "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). However, the Tucker Act does not create a substantive right enforceable against the United States. *United States v. Testan*, 424 U.S. 392, 398 (1976). A claimant must identify another source of law that creates the substantive right and demonstrate that the source of law mandates compensation. *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983). The other source of law must be "reasonably amenable to the reading that it mandates a right of recovery in damages." *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003)).

The Court has an obligation to examine pending actions to determine whether they are within the Court's jurisdiction. *Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340, 1342 (Fed. Cir. 2001). The Court may raise jurisdictional considerations at any time *sua sponte*. *Id.* If the Court determines that it does not have jurisdiction over plaintiffs' claims, it must dismiss the complaint. RCFC 12(h)(3); *see also Pinkston v. United States*, 6 Cl. Ct. 263, 265 (1984).

III. Discussion

A. The Court Consolidates Flores I *and* Flores II *in Order to Promote Efficiency in Dealing With the Interrelated Facts and Legal Issues Presented in Both Cases.*

Pursuant to RCFC 42(a)(2), two actions may be consolidated when they involve common questions of law or fact. A court may consolidate separate actions *sua sponte*. *See* RCFC 42(a); *Kovachevich v. United States*, 2005 WL 6124312, at *1 (Fed. Cl. Aug. 25, 2005). In deciding whether to consolidate, the Court weighs "the interest of judicial economy against the potential for delay, confusion, and prejudice that may result from consolidation." *Cienega Gardens v. United States*, 62 Fed. Cl. 28, 31 (2004) (citing *Karuk Tribe of Cal. v. United States*, 27 Fed. Cl. 429, 433 (1993)), *rev'd on other grounds sub nom. Independence Park Apartments v. United States*, 449 F.3d 1235 (Fed. Cir. 2006).

In consideration of the largely overlapping allegations in plaintiffs' complaints, the Court will consolidate plaintiffs' actions. *Flores II* alleges the same facts as *Flores I*, Compl. at 14-27, and seeks much of the same relief. Compl. at 28. Furthermore, plaintiffs recognize that the complaints involve identical questions of law and fact, Compl. at 4, and plaintiffs state that they filed *Flores II* to acquire medical records in order to prove the allegations made in the *Flores I* complaint. Compl. at 28. No discernible delay, confusion, or prejudice would result from consolidation, and judicial economy would be greatly benefited by consolidating the actions. Therefore, the Court **ORDERS** that *Flores I* and *Flores II* be consolidated for all purposes.

B. *The Court Does Not Have Jurisdiction Over Any of Plaintiffs' Claims, and They Are Properly Subject to Dismissal* Sua Sponte *on That Basis.*

Plaintiffs base their claims on the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), which explicitly provides that federal district courts have exclusive jurisdiction over tort claims such as claims involving personal injury or death. *See also* 28 U.S.C. § 1491(a)(1) (granting the Court of Federal Claims jurisdiction over claims for money damages against the United States "*not sounding in tort*" (emphasis added)); *Schillinger v. United States*, 155 U.S. 163, 169 (1894) ("[C]ases sounding in tort are not cognizable in the court of claims."); *Zhao v. United States*, 91 Fed. Cl. 95, 100 (2010). Plaintiffs' factual allegations that the Government has used satellites to cause them severe pain, injury, and death are all tort claims that are not within the Court's jurisdiction. In addition, plaintiffs' requested relief is based on the same factual allegations. Plaintiffs' claims and requested relief rely on allegations of tortious conduct, and this Court does not have jurisdiction over such claims.

To the extent that plaintiffs assert claims under the Eighth and Fourteenth Amendments, those claims are also not within the Court's jurisdiction. Plaintiffs allege that Sierra Medical Center failed to provide adequate medical care in violation of the Eighth and Fourteenth Amendments. *Flores II* Compl. at 6. Pursuant to § 1491(a)(1), the Court has jurisdiction over claims only when the provisions allegedly violated are money-mandating. Neither the Eighth nor Fourteenth Amendment is money-mandating. *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (dismissing plaintiff's claims alleging violation of the Due Process Clause of the Fourteenth Amendment because it is not money-mandating); *Hurt v. United States*, 64 Fed. Cl. 88, 89 (2005), *aff'd*, 134 F. App'x 446 (Fed. Cir. June 2, 2005) (dismissing claims based on the Eighth Amendment for lack of jurisdiction); *see also Miller v. United States*, 67 Fed. Cl. 195, 199 (2005) (dismissing plaintiff's claims based on the Eighth and Fourteenth Amendments for lack of jurisdiction). Therefore, the Court will **DISMISS** plaintiffs' actions for lack of subject matter jurisdiction pursuant to RCFC 12(h)(3).

C. *Plaintiffs' Claims Are Frivolous, and They Are Properly Subject to Dismissal* Sua Sponte *on That Basis As Well.*

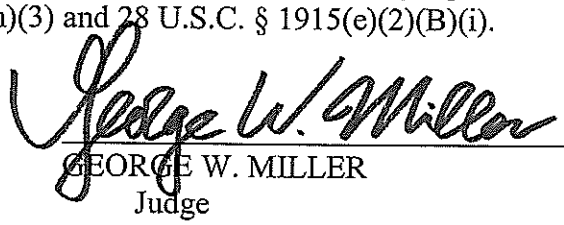
The statute permitting plaintiffs to appear *in forma pauperis* also requires the Court to dismiss such actions if they are "frivolous." 28 U.S.C. § 1915(e)(2)(B)(i). A claim is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). No basis in law or fact exists if a complaint "embraces . . . inarguable legal conclusions" or "fanciful factual allegations." *Id.*; *see also Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (holding that a complaint is frivolous "when the facts alleged rise to the level of the irrational or the wholly incredible"). Section 1915(e)(2)(B)(i) provides that a court may determine whether a *pro se* plaintiff's claims are frivolous *sua sponte*, and if so, the court's finding is an independent basis for dismissal. *See Neitzke,* 490 U.S. at 328.

In this case, plaintiff's claims lack any basis in law or in fact. Plaintiffs allege that the Government has been using satellites from outer space to "calculate[] a genetic code to inflict . . . genetic virisus [sic] causeing [sic] severe pain." Compl. at 9. This allegation, which is the basis for all of plaintiffs' claims, is fanciful at best. *See Flores v. United States Attorney Gen.*, 2010 WL 5540951, at *3, 5 (W.D. Tex. Sept. 29, 2010) (dismissing as frivolous a nearly

identical complaint filed by plaintiff Eric Flores and imposing sanctions upon Mr. Flores for repeatedly filing frivolous complaints); *Gant v. Lockheed Martin Corp.*, 2004 WL 1068131, at *2 (N.D. Tex. May 11, 2004) (dismissing as frivolous plaintiff's claims that satellites were transmitting harmful electromagnetic waves), *aff'd*, 152 F. App'x 396 (5th Cir. 2005). The relief plaintiffs seek in their complaints is based on the same fanciful factual allegations that the Court concludes are frivolous. Because plaintiffs' complaints lack an arguable basis in fact, they are frivolous and must accordingly be **DISMISSED**.[5]

CONCLUSION

Construing plaintiffs' consolidated complaints liberally, the Court holds that it lacks jurisdiction over plaintiffs' actions. In addition, the Court dismisses plaintiffs' complaints as frivolous pursuant to § 1915(e)(2)(B)(i). Accordingly, the Clerk shall enter judgment dismissing plaintiffs' complaints pursuant to RCFC 12(h)(3) and 28 U.S.C. § 1915(e)(2)(B)(i).



GEORGE W. MILLER
Judge

[5] When a court lacks subject matter jurisdiction over a claim, it may transfer that claim to another court in which the claim could have been brought if such transfer is "in the interest of justice." 28 U.S.C. § 1631. Because the Court finds that plaintiff's claims are so lacking in merit as to be frivolous, transferring this case would be futile. *See Young v. United States*, 88 Fed. Cl. 283, 292 (2009), *appeal dismissed*, 367 F. App'x 125 (Fed. Cir. 2009).