In the United States Court of Federal Claims

No. 11-782C
(Filed: July 20, 2012)
NOT FOR PUBLICATION

MARCO ANTONIO GALLO-RODRÍGUEZ,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Marco Antonio Gallo-Rodríguez, Bogotá, Colom., plaintiff, *pro se*.

Stacey K. Grigsby, Trial Attorney, Brian M. Simkin, Assistant Director, Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, Tony West, Assistant Attorney General, United States Department of Justice, Washington, D.C., for defendant.

OPINION AND ORDER

GEORGE W. MILLER, Judge

Plaintiff, Marco Antonio Gallo-Rodríguez, appearing *pro se*, filed a complaint in this court on November 21, 2011 demanding $500 million from the United States government (docket entry 1). Plaintiff states that the memorandum of law accompanying his petition for a writ of habeas corpus was mutilated in transit when it was transferred from one district court to another and was never included in his case file. Compl. 2. Plaintiff claims that this "seriously compromise[d]" the outcome of his habeas petition as well as his subsequent lawsuit and its appeal. *Id.* at 3. Defendant, the United States, moved to dismiss plaintiff's action on February 10, 2012 for lack of jurisdiction pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"), arguing that plaintiff's claims do not fall within the court's Tucker Act jurisdiction or, in the alternative, that they are time barred because they were filed beyond the six-year statute of limitations set forth in 28 U.S.C. § 2501. Def.'s Mot. for Summ. Dismissal of *Pro Se* Compl. ("Def.'s Mot.") 4–6 (docket entry 6). Plaintiff filed a response to defendant's motion to dismiss, by leave of the Court, on March 29, 2012 and moved under RCFC 12(i) for a hearing before trial (docket entry 9). Defendant replied in support of its motion to dismiss on April 16, 2012 (docket entry 10). For the reasons set forth below, the Court **GRANTS** defendant's motion to dismiss for lack of subject matter jurisdiction.

I. Background

On December 8, 1994, plaintiff was convicted in the United States District Court for the Southern District of Florida of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. Compl. Ex. A, at 3.[1] He was sentenced to 121 months imprisonment. *Id.* Plaintiff's convictions were affirmed by the United States Court of Appeals for the Eleventh Circuit. *Id.* Ex. A, at 3–4; *see United States v. Mora*, 132 F.3d 45 (11th Cir. 1997) (unpublished table decision). On January 2, 2001, while in custody at the Federal Correctional Center Beaumont in Beaumont, Texas, plaintiff filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of Texas. Compl. 1–2; *see id.* Ex. A, at 6–11. In his petition, plaintiff asserted that he was denied effective assistance of counsel at trial and on appeal and that he had been subjected to prosecutorial and judicial misconduct. *Id.* Ex. A, at 6–11. The court construed the petition as a motion to vacate pursuant to 28 U.S.C. § 2255 and, after noting that "the only court with jurisdiction to hear [a § 2255 motion] is the court that sentenced [plaintiff]," determined that venue was improper and transferred the case to the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1406(a). Memorandum Opinion at 2–3, *Gallo-Rodriguez v. United States*, No. 1:01-cv-00007-RAS-WCR (E.D. Tex. Jan. 31, 2001), ECF No. 2; *see* Order of Transfer at 1, *Gallo-Rodriguez v. United States*, No. 1:01-cv-00007-RAS-WCR (E.D. Tex. Jan. 31, 2001), ECF No. 3. The United States District Court for the Southern District of Florida dismissed plaintiff's motion as time barred. Order of Dismissal Motion to Vacate at 1, *Gallo-Rodriguez v. United States*, No. 9:01-cv-08212-DTKH (S.D. Fla. Feb. 7, 2002), ECF No. 43. Plaintiff sought an appeal, and the district court denied his motion for a certificate of appealability, Order Denying Motion for Certificate of Appealability at 1, *Gallo-Rodriguez v. United States*, No. 9:01-cv-08212-DTKH (S.D. Fla. Apr. 3, 2002), ECF No. 49, which is required to pursue an appeal from a final order in a proceeding under § 2255. The United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of plaintiff's motion for a certificate. *Gallo-Rodriguez v. United States*, No. 02-11361-C (11th Cir. Jul. 26, 2002), *cert. denied*, 537 U.S. 1097 (2002).

Plaintiff subsequently initiated suit in the United States District Court for the District of Columbia alleging that the United States Supreme Court, the United States Courts of Appeals for the Fifth and Eleventh Circuits, and the United States District Courts for the Southern District of Florida and the Eastern District of Texas, "refused to hear plaintiff's underlying constitutional claims that were brought to their attention through a habeas corpus petition." *Gallo-Rodriguez v. Supreme Court of the United States*, No. 08-1890 (RWR), 2009 WL 3878073, at *1 (D.D.C. Nov. 19, 2009) (internal quotation marks omitted); *see* Compl. 2. The United States District Court for the District of Columbia dismissed the lawsuit for lack of subject matter jurisdiction. *Gallo-Rodriguez*, 2009 WL 3878073, at *1–2; *see* Compl. 2. Plaintiff appealed to the United States Court of Appeals for the Federal Circuit, which transferred his appeal to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1631. *Gallo-Rodriguez v. Supreme Court of the United States*, No. 2010-1186, 2010 WL 1816433, at *1 (Fed. Cir. May 3, 2010). The D.C. Circuit affirmed the district court. *Gallo-Rodriguez v. Supreme Court of the United States*, No. 10-5224, 2010 WL 4340397, at *1 (D.C. Cir. Nov. 1, 2010).

[1] Exhibit A to plaintiff's complaint is his petition for a writ of habeas corpus.

Plaintiff represents that he is currently petitioning the United States Supreme Court for a writ of certiorari. Compl. 2.

In the current case, plaintiff states that, while he was searching Public Access to Court Electronic Records ("PACER")[2] to prepare documents for his suit in the D.C. District Court, he discovered that the memorandum of law he filed with his habeas petition was not included in his case file when it was transferred to the Southern District of Florida from the Southern District of Texas. *Id.* at 2. He alleges that the file was "mutilated" in transit and that the disappearance of his memorandum "seriously compromise[d] the outcome of [his] habeas petition as well as the lawsuit filed in the U.S. District Court for the District of Columbia." *Id.* at 2–3. As relief, plaintiff seeks $500 million, arguing that the Supreme Court's decisions in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and *Carlson v. Green*, 446 U.S. 14 (1980), support his claims. Compl. 1, 3.

II. Discussion

The United States Court of Federal Claims has subject matter jurisdiction over "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). When deciding a case based on a defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), the court must determine whether it has authority to address a plaintiff's legal and factual issues. *Brach v. United States*, 443 F. App'x 543, 547 (Fed. Cir. 2011). In so doing, the court assumes that all of a plaintiff's uncontested factual allegations are true and draws all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). Furthermore, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501.

A court will "liberally" construe a *pro se* plaintiff's pleadings when assessing that plaintiff's case. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" (citation omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))); *see Humphrey v. United States*, 52 Fed. Cl. 593, 595 (2002) ("[T]he Court will generously construe a *pro se* complaint . . . ."), *aff'd*, 60 F. App'x 292 (Fed. Cir. 2003). However, a *pro se* plaintiff "still must establish the requisite elements of his claim," including the court's subject matter jurisdiction. *Humphrey*, 52 Fed. Cl. at 595. In the Court of Federal Claims, this includes establishing by a preponderance of the evidence that the plaintiff's case was timely filed. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130,

[2] PACER is an electronic service that allows users to obtain case and docket information from federal appellate, district, and bankruptcy courts. Admin. Office of the U.S. Courts, PACER Serv. Ctr., PACER: Public Access to Court Electronic Records, http://www.pacer.gov/ (last visited July 20, 2012).

134–36 (2008) (explaining that the statute of limitations in 28 U.S.C. § 2501 is jurisdictional in nature); *Banks v. United States*, 102 Fed. Cl. 115, 127 (2011) ("Because the statute of limitations in this court is jurisdictional, plaintiffs have the burden of showing by a preponderance of the evidence that their claims were timely filed." (citation omitted) (citing *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc)). If the court finds that it lacks subject matter jurisdiction, it must dismiss the claim. RCFC 12(h)(3).

A. The Court Lacks Subject Matter Jurisdiction to Adjudicate Plaintiff's Claims Because They Are Not Based upon Money-Mandating Provisions of Law

This court has jurisdiction over claims derived from money-mandating sources of law. 28 U.S.C. § 1491(a)(1); *see Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). "Jurisdiction under the Tucker Act exists if the statute, regulation or constitutional provision that is the basis for the complaint 'can fairly be interpreted as mandating compensation by the Federal Government.'" *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1307 (Fed. Cir. 2008) (quoting *United States v. Mitchell*, 463 U.S. 206, 217 (1983)). If the court concludes that a source on which a claim is based is not money mandating, it "shall dismiss the cause for lack of jurisdiction, . . . the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act." *Fisher*, 402 F.3d at 1173.

In his complaint, plaintiff cites to *Bivens* and *Carlson* "[i]n order to provide citations to the underlying statutes or regulations that mandate the payment of money." Compl. 1. *Bivens* established that there is an implied cause of action against federal government officials who have violated an individual's Fourth Amendment rights. *Bivens*, 403 U.S. at 395–96. In *Carlson,* the Supreme Court extended *Bivens* actions to violations of the cruel and unusual punishment clause of the Eighth Amendment. *Carlson*, 446 U.S. at 19–24. Despite plaintiff's contention to the contrary, the Court of Federal Claims lacks jurisdiction to entertain *Bivens* actions because they are actions against individuals, not the United States and, therefore, are not within the court's Tucker Act 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 . . . lie outside the jurisdiction of the Court of Federal Claims." (citation omitted)). This Court thus lacks jurisdiction over plaintiff's claims that are based on *Bivens* and *Carlson*. *See id.*

Furthermore, to the extent plaintiff requests that the Court review decisions of other courts relating to the proceedings before those courts, to issue a writ of habeas corpus, or to review his conviction, this court does not have jurisdiction. *See Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002) (stating that the Court of Federal Claims is not empowered to grant a writ of habeas corpus); *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) (holding that the Court of Federal Claims cannot review the decisions of other courts relating to proceedings before those courts); *Zakiya v. United States*, 79 Fed. Cl. 231, 234–35 (2007) ("The Court of Federal Claims does not have the power to review and overturn convictions or to review in detail the facts surrounding a conviction or imprisonment." (citing *Humphrey*, 52 Fed. Cl. at 596)), *aff'd*, 277 F. App'x 985 (Fed. Cir. 2008); *Dethlefs v. United States*, 60 Fed. Cl. 810, 814 (2004) ("The unjust conviction statutes do not give the Court [of Federal Claims] authority to review and overturn convictions entered by a court of competent jurisdiction.").

Plaintiff also argues that his claims are based on violations of the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments of the U.S. Constitution. Pl.'s Resp. to Def.'s Mot. for Summ. Dismissal of *Pro Se* Compl. ("Pl.'s Resp.") 2. The jurisdiction of the Court of Federal Claims, however, does not extend to plaintiff's claims based upon the First, Fourth, Sixth, Seventh, or Eighth Amendments because those amendments are not money mandating. *See Trafny v. United States*, 503 F.3d 1339, 1340 (Fed. Cir. 2007) (stating that the Eighth Amendment is not money mandating); *Smith v. United States*, 36 F. App'x 444, 446 (Fed. Cir. 2002) (stating that the Court of Federal Claims does not have jurisdiction over Fourth and Sixth amendment claims because neither obligates the United States to pay money damages); *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (citing *Featheringill v. United States*, 217 Ct. Cl. 24, 32–33 (1978)) (holding that the First Amendment is not money mandating); *Webster v. United States*, 74 Fed. Cl. 439, 444 (2006) (explaining that the Seventh Amendment does not provide a jurisdictional basis for cases brought before the Court of Federal Claims and that it is not money mandating).

The court's jurisdiction also does not extend to plaintiff's claims to the extent they are based on the due process clause of the Fifth Amendment. *Joshua*, 17 F.3d at 379 ("[T]he due process and equal protection clauses of the Fifth Amendment do not provide for the payment of monies, even if there were a violation."). Although the takings clause of the Fifth Amendment is money mandating, *see Jan's Helicopter Serv., Inc.*, 525 F.3d at 1309, plaintiff has not alleged any facts that would state a claim under a takings theory. Even if the Court were to construe plaintiff's action as an argument that his incarceration was a "taking" of his property without compensation, the Court would not have jurisdiction. *See Jones v. United States*, 440 F. App'x 916, 918 (Fed. Cir. 2011) (stating that, although the takings clause of the Fifth Amendment is money mandating, the "[s]eizure of convicted prisoners and their personal property are not the kinds of takings that are prohibited by the Fifth Amendment"). Accordingly, because plaintiff does not base any of his claims on a money-mandating source of law, his claims must be dismissed for lack of jurisdiction.

B. The Court Lacks Subject Matter Jurisdiction Because Plaintiff Has Not Alleged Facts Sufficient to Demonstrate that His Claims Were Timely Filed

Defendant also argues in the alternative that this court lacks jurisdiction because plaintiff's claims are time barred. Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Summ. Dismissal of *Pro Se* Compl. ("Def.'s Reply") 3–5; Def.'s Mot. 5–6. All claims over which the United States Court of Federal Claims has jurisdiction must be brought within six years of their accrual. *See* 28 U.S.C. § 2501. A claim first accrues "when all the events have occurred that fix the alleged liability of the government and entitle the claimant to institute an action." *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009); *see also Martinez*, 333 F.3d at 1303 (holding that a claim accrues as soon as all events that would enable a plaintiff to bring suit occur). The statute of limitations stated in 28 U.S.C. § 2501 is jurisdictional in nature, and a plaintiff must show by a preponderance of the evidence that his or her claims were timely filed. *John R. Sand & Gravel Co.*, 552 U.S. at 134–36; *Banks*, 102 Fed. Cl. at 127.

It is unclear precisely when plaintiff's memorandum was "mutilated" or lost in transit. Plaintiff alleges the mutilation occurred "somewhere between the mail room of FCC Beaumont (Low) and the United States District Court for the Southern District of Florida." Compl. 2. One

can speculate from this allegation that the destruction of the memorandum occurred sometime between January 2001 (when plaintiff filed his petition in the Eastern District of Texas), *id.* Ex. A, at 1, and February 2002 (when the Southern District of Florida dismissed plaintiff's petition). *See Gallo-Rodriguez v. United States*, No. 9:01-cv-08212-DTKH (S.D. Fla. Mar. 12, 2001), ECF No. 2. However, no filing date in that time period would cause plaintiff's complaint to be timely. At the latest, plaintiff should have known of the mutilation by February 7, 2002, when the district court dismissed his petition. This is well beyond the statute of limitations period.

In response to defendant's timeliness argument, plaintiff contends that his claims did not accrue in February 2002. He states that after his habeas petition was dismissed, he was "struggling to file an appeal to the Eleventh Circuit Court of Appeals until July 26, 2002, when the [Eleventh Circuit] denied him the certificate of appealability" and that, after this denial, he was "struggling to file a petition for a writ of certiorari before the Supreme Court until May, 2003." Pl.'s Resp. 3. The accrual of his claims on either of these dates, however, would not cause his action to be timely.

Plaintiff also argues that his claims did not accrue until August 14, 2009, when he learned of the disappearance of his memorandum. *Id.* at 3. Under the "accrual suspension rule," which plaintiff seemingly attempts to invoke, a claim will be "suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed." *Martinez*, 333 F.3d at 1319. For accrual suspension to apply, the plaintiff "must either show that [the] defendant has concealed its acts with the result that [the] plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." *Id.* (quoting *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985)). Plaintiff has not alleged the existence of any facts that suggest that the government concealed its actions or that plaintiff's claim was inherently unknowable. Plaintiff knew his habeas petition was denied on February 7, 2002, and he knew, or should have known, any negative effects flowing from the allegedly lost memorandum on that date.[3] Accordingly, plaintiff's argument that his claims are timely because the accrual of his claims should be suspended fails. The latest plaintiff could have brought his claims before the Court of Federal Claims was February 7, 2008, and nothing indicates that his claim accrued six years prior to the filing of his complaint, or some time after November 21, 2005. Therefore, even if plaintiff had based his claims on a money-mandating source of law pursuant to the Tucker Act, *see supra* Part II.A, the Court would not have jurisdiction because his claims are time barred.

Thus, the Court dismisses plaintiff's claims for lack of subject matter jurisdiction.

---

[3] Plaintiff recognizes in his complaint that, despite numerous citations in his petition to the memorandum, the district court opinions did not refer to or discuss the memorandum. Compl. 2–3; *see Dubsky v. United States*, 98 Fed. Cl. 703, 709 ("[A]t all times [the plaintiff] possessed the factual information required to bring his claim in this [c]ourt, even if he lacked the awareness of his legal right to do so."), *appeal dismissed*, 461 F. App'x 929 (Fed. Cir. 2011).

C. Oral Argument Is Unnecessary

Plaintiff has moved this Court pursuant to RCFC 12(i) for a hearing before trial. Pl.'s Resp. 4. Although RCFC 12(i) requires that, when requested, any defense listed in RCFC 12(b)(1)–(7) be "heard and decided before trial unless the court orders a deferral until trial," the court may "hear" those motions without holding oral argument. *Young v. United States*, 94 Fed. Cl. 671, 675–76 (2010). Here, the Court has carefully considered both parties' arguments relating to defendant's motion to dismiss and has determined that oral argument is unnecessary. *See id.* at 676; *see also Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 448 (2d Cir. 1995) ("Courts have broad discretion to determine how much, if any, oral argument is appropriate in a given case.").

D. The Court Is Not Persuaded that It Would Be in the Interest of Justice to Transfer Plaintiff's Claims to Another Court

When the court concludes that it lacks subject matter jurisdiction over a plaintiff's claims, it shall transfer the action or claims to a court in which the action or claims could have been brought if such transfer is "in the interest of justice." 28 U.S.C. § 1631; *see id.* § 610 (including the Court of Federal Claims in the definition of "courts" for purposes of § 1631). The court may transfer an action or claims without being asked by either party. *Tex. Peanut Farmers v. United States*, 409 F.3d 1370, 1375 (Fed. Cir. 2005). To transfer an action or claims, a court must find that "(1) it lacks subject matter jurisdiction; (2) at the time the case was filed, the case could have been brought in the transferee court; and (3) transfer is in the interest of justice." *Wickliffe v. United States*, 102 Fed. Cl. 102, 110 (2011) (citing 28 U.S.C. § 1631; *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1364 n.5, 1374 (Fed. Cir. 1983) (en banc)).

Here, as discussed, the Court has concluded that it lacks jurisdiction over plaintiff's claims. However, plaintiff has not provided enough information for the Court to determine in what court, if any, his action or claims could have been brought at the time this case was filed. Moreover, even if the Court could identify a potential transferee court, it does not appear that it would be in the interest of justice to transfer plaintiff's action or any of his claims to another court.[4] Accordingly, the Court declines to order such a transfer.

[4] Moreover, to the Court's knowledge, plaintiff is no longer incarcerated in the United States. *See* Fed. Bureau of Prisons, Inmate Locator, http://www.bop.gov/iloc2/LocateInmate.jsp (last visited July 20, 2012) (indicating that plaintiff (Register Number 43107-004) was released from custody on November 18, 2002); *see also* Compl. Ex. A, at 1 (displaying plaintiff's prison number, 43107-004).

CONCLUSION

In view of the foregoing, the Court **GRANTS** defendant's motion to dismiss for lack of jurisdiction pursuant to RCFC 12(b)(1). The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

GEORGE W. MILLER
Judge