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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

OSCAR DE JESUS-MALDONADO

Plaintiff

v.

Civil No. 09-1574

VETERANS ADMINISTRATION
HOSPITAL, ET AL

Defendants

Opinion & Order

Pending before this Court is Defendant Veterans Administration Hospital’s (“VA”) motion to dismiss (Docket # 8). Plaintiff, Oscar De Jesus-Maldonado (“De Jesus”), has not proffered an opposition. After reviewing the filings, and the applicable law, Defendants’ motion to dismiss is **GRANTED**.

Factual & Procedural Background

On June 25, 2009, the VA removed the present lawsuit, which Plaintiff originally filed *pro se* in the Puerto Rico Court of First Instance - San Juan Section. See Docket # 8, Exh. I. Plaintiff alleges that he underwent surgery at the San Juan VA Hospital on May 21, 2008, and that various weeks later he realized a 12 inch-long wire was left in his body by the attending physician and nurses. See also Docket # 1-4 at 4. As a result, Plaintiff allegedly had to be operated on again, which led to a kidney failure, excruciating pain, and a nearly fatal infection. Id. In order to seek redress for his perceived injuries, he brought the present claim under Article 1802 of the Civil Code of Puerto Rico.

The VA answered plaintiff's claim with a notice of removal to this Court, alleging that the present matter is the exclusive jurisdiction of the Federal Tort Claims Act (FTCA). 28

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3 U.S.C. § 2671 et seq. Furthermore, the VA alleges that the FTCA and 28 C.F.R. 13.604(a)
4 require that tort claims against the agency and its employees first be submitted to administrative
5 review. To wit, the VA has submitted an affidavit showing that a review of the VA's records
6 affirms that Plaintiff has not filed an administrative tort claim in this VA region. See Docket
7 # 8, Exh. I. In light of this, the VA filed the present motion alleging that this Court lacks subject
8 matter jurisdiction, and that the United States of America is the only proper party defendant in
9 a suit of this nature. Because Plaintiff has not opposed the present motion to dismiss, he has
10 waived his opportunity to present counter arguments.

11 **Standard of Review**

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13 FED. R. CIV. P. 12(b)(1) is the proper vehicle for challenging a court's subject matter
14 jurisdiction. Valentín v. Hospital Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001). Under this
15 rule, a wide variety of challenges to the Court's subject matter jurisdiction may be asserted,
16 among them those based on sovereign immunity, ripeness, mootness, and the existence of a
17 federal question. Id. (citations omitted). When faced with a similar jurisdictional challenge,
18 this Court must “. . . give weight to the well-pleaded factual averments in the operative
19 pleadings [. . .] and indulge every reasonable inference in the pleader's favor.” Aguilar v. U.S.
20 Immigration and Customs Enforcement Div. of Dept. of Homeland Sec., 510 F.3d 1, 8 (1st
21 Cir.2007).

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23 A plaintiff faced with a motion to dismiss for lack of subject matter jurisdiction has the
24 burden to demonstrate that such jurisdiction exists. See Lord v. Casco Bay Weekly, Inc., 789
25 F. Supp. 32, 33 (D. Me. 1992); see also SURCCO V. PRASA, 157 F. Supp. 2d 160, 163 (D.
26 P.R. 2001). However, in order for a plaintiff's claim to be dismissed for lack of subject matter
jurisdiction, due to the inadequacy of the plaintiff's federal claim, that claim must be “. . . so

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3 insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely
4 devoid of merit as not to involve a federal controversy.” Oneida Indian Nation of N.Y. v.
5 County of Oneida, 414 U.S. 661, 666 (1974). In this context, this Court is empowered to resolve
6 factual disputes by making reference to evidence in the record beyond the plaintiff’s allegations
7 without having to convert the motion to dismiss into one for summary judgment. See Lord, 789
8 F. Supp. at 33 (D. Me. 1992); see also SURCCO, 157 F. Supp. 2d at 163 (D. P.R. 2001).
9 “Where a party challenges the accuracy of the pleaded jurisdictional facts, the court may
10 conduct a broad inquiry, taking evidence and making findings of fact.” Hernández-Santiago v.
11 Ecolab, Inc., 397 F. 3d 30 (1st Cir. 2005). Therefore, the court may consider extrinsic materials,
12 “and, to the extent it engages in jurisdictional fact-finding, is free to test the truthfulness of the
13 plaintiff’s allegations.” Dynamic, 221 F. 3d at 38. That is, the principle of conversion of a
14 motion to dismiss into a motion for summary judgment when extrinsic materials are reviewed,
15 does not apply in regards to a motion to dismiss for lack of subject matter jurisdiction. Id.

16 **Applicable Law & Analysis**

17 The FTCA acts as a waiver of the United States’s sovereign immunity for some torts
18 claims. And its section 28 U.S.C. § 1346(b)(1) establishes that the United States District Courts
19 have exclusive jurisdiction for claims against the United States. The statute also “provides that
20 the federal district courts shall have exclusive jurisdiction over damages claims against the
21 United States for injury or loss of property, or for personal injury or death ‘caused by the
22 negligent or wrongful act or omission of any employee of the Government while acting within
23 the scope of his office or employment.’” Celestine v. Mount Vernon Neighborhood Health
24 Center, 403 F.3d 76, 80 (2nd Cir. 2005). Because of the exclusive nature of the remedy, an FTCA
25 action may not be brought in conjunction with a state law tort claim, such as Article 1802.
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3 Furthermore, the FTCA immunizes most federal employees and agents from “. . . liability for
4 negligent or wrongful acts done in the scope of their employment.” Id.

5 The VA successfully argues that Plaintiff erred when he filled the present suit *eo nomine*
6 against the agency, and other individual defendants. The First Circuit has interpreted that the
7 FTCA bars suit bars tort suits directed against federal agencies and their employees *eo nomine*.
8 Armor Elevator Co., Inc. v. Phoenix Urban Corp., 655 F.2d 19, 22 (1st Cir. 1981). Rather FTCA
9 claims must be brought against the United States directly. Accordingly, all claims against the
10 VA, and the individual co-defendants are hereby **DISMISSED WITH PREJUDICE**.

11 If the only defect in Plaintiff’s complaint were the parties he named, or his choice of law,
12 this Court would permit Plaintiff to amend the complaint due to his *pro se* status. Nevertheless,
13 FTCA claims require that in order for the United States to waive its immunity “an
14 administrative claim be filed and finally denied. . .” Celestine v. Mount Vernon Neighborhood
15 Health Center, 283 F. Supp. 2d 392, 399 (S.D.N.Y. 2003); McNeil v. United States, 508 U.S.
16 106, 113 (1993). Thus, “an administrative claim is thus an absolute jurisdictional prerequisite
17 to litigation.” Ewing v. Beth Israel Deaconess Medical Center, No. 09-11128, 2009 WL2425966
18 (D. Mass. 2009); see also Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir.2002). Plaintiff
19 has not alleged that he filed an administrative complaint, and the VA has proffered evidence that
20 no effort has been made to bring the grievance before the agency. Accordingly, this complaint
21 must be **DISMISSED**. Plaintiff may pursue administrative remedies with the VA, and then, if
22 necessary, file a new claim against the United States.

23 **CONCLUSIONS**

24 For the foregoing reasons, the present claim is **DISMISSED**. Judgment shall be entered
25 accordingly.
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IT IS SO ORDERED.

In San Juan, Puerto Rico, this 24th day of August, 2009.

S/ Salvador E. Casellas
SALVADOR E. CASELLAS
United States District Judge