MGA Entertainment Inc v. Mattel Inc et al
Doc. 45

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
DAVID A. DeJUTE, California Bar No. 153527
Assistant United States Attorney
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-2574
Telefax: (213) 894-7819
Email: david.dejute@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

RODNEY THOMAS Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. EDCV 07-1138 SGL (JCRx) DATE: February 4, 2008 TIME: 10 a.m. CTRM: ONE Hon. Stephen G. Larson

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

Dockets.Justia.com

1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **I.**
3 **INTRODUCTION**
4 The United States seeks to have Plaintiff's FTCA claims
5 transferred to the Southern District of New York, the forum where
6 Plaintiff originally filed his FTCA claims and where his *Bivens*
7 claims are currently pending. There exists no reason in law or
8 in logic for Plaintiff to be allowed to split his claims.
9 Instead, to promote judicial efficiency, reduce costs and avoid
10 inconsistent judgments, this Court is respectfully requested to
11 grant Defendant's motion to transfer.
12 **II.**
13 **FACTS**
14 In 2003, Plaintiff Rodney Thomas filed an action in the
15 Southern District of New York alleging claims under *Bivens* and
16 the FTCA arising out of the failure to receive adequate medical
17 care for his glaucoma. *See* New York First Amended Complaint,
18 attached to the Request for Judicial Notice filed in connection
19 with this motion. In 2004, the New York District Court dismissed
20 the *Bivens* claims for lack of personal jurisdiction and dismissed
21 the FTCA claims, contrary to the assertion in the opposition, for
22 *failure to exhaust administrative remedies*. *See* Thomas v.
23 Ashcroft, 2004 WL 1444735 (S.D.N.Y. 2004)(attached).
24 Thomas appealed and, in 2006, the Second Circuit affirmed in
25 part and reversed in part, holding that some of the *Bivens* claims
26 were improperly dismissed. *See* Thomas v. Ashcroft, 470 F.3d 491
27 (2nd Cir. 2006). In the meantime, Thomas exhausted his
28 administrative remedies and filed a lawsuit in this District

alleging failure to receive adequate medical care for his glaucoma while en route to New York. Nothing contained in the dismissal by the New York District Court, nor in the opinion by the Second Circuit, prevented Thomas from re-filing his FTCA claims in the Southern District of New York. Indeed, his FTCA claims were dismissed by the New York Court *without prejudice*. *See* Thomas v. Ashcroft, 2004 WL 1444735 (S.D.N.Y. 2004).

III.

THIS CASE SHOULD BE TRANSFERRED TO THE FORUM WHERE PLAINTIFF ORIGINALLY BROUGHT HIS FTCA CLAIMS

A. Plaintiff Could Have And Should Have Brought His FTCA Claims In New York

In its motion, the United States urged this Court to transfer this matter to the Southern District of New York, the forum where the Plaintiff originally filed his *Bivens* and FTCA claims and where his *Bivens* claims are currently pending. It has long been the law that a plaintiff may not, through artful pleading, take advantage of the liberal choice of forum laws:

> [A] court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 67 S.Ct. 839, 842 (1947). As more fully explained in the motion, Ninth Circuit law

1 weighs in favor of transferring this case to the Southern
2 District of New York. *See* Jacobson v. Hughes Aircraft Co., 105
3 F.3d 288, 1302 (9th Cir. 1997).
4 In opposition, the Plaintiff disingenuously argues that
5 Thomas could not have brought his FTCA claims in New York. *See*
6 Opposition 6-8. That is not true. Contrary to the assertions in
7 the opposition, the Plaintiff's FTCA claims were not dismissed
8 for lack of personal jurisdiction as were his *Bivens* claims;
9 instead, his FTCA claims were dismissed for failure to exhaust
10 his administrative remedies. *See* Thomas v. Ashcroft, 2004 WL
11 1444735 (S.D.N.Y. 2004). Consequently, once he had satisfied the
12 jurisdictional prerequisite of submitting an administrative
13 claim, nothing precluded him from again bringing his FTCA claims
14 in New York. Moreover, the FTCA claims were dismissed without
15 prejudice. *Id.* Now that Thomas has exhausted his administrative
16 remedies, he could just as easily have filed his FTCA claims in
17 New York, where his *Bivens* claims are pending, as opposed to
18 California.
19 Thomas also asserts that, absent governmental consent, he
20 could not have brought his FTCA claims in New York. *See*
21 Opposition 8. Lest there be any confusion on Plaintiff's part,
22 the United States hereby consents to the transfer of Plaintiff's
23 FTCA claims to the Southern District of New York. Moreover, upon
24 transfer by this Court, the United States will not move to
25 dismiss the Plaintiff's FTCA claims on the ground of improper
26 venue.
27 The Plaintiff asserts that he "tried to do *exactly* what the
28 Government says he should have done: assert his entire bundle of

1 claims stemming from all medical malpractice in a single action
2 in the Southern District of New York." Opposition 8 (emphasis in
3 original). Plaintiff should be held to his word. Preferring to
4 "file his entire bundle of claims stemming from all medical
5 malpractice in a single action in the Southern District of New
6 York," and no reason existing why he could not do so now,
7 Plaintiff's FTCA claims should be transferred to where his *Bivens*
8 claims are now pending.

9 **B. New York Is A More Convenient Forum**

10 In its motion, the United States set forth the reasons why
11 New York is a more convenient forum. The forum where Plaintiff's
12 *Bivens* claims are pending, and where he originally brought his
13 FTCA claims, is by definition the more convenient forum. In his
14 opposition, Thomas has not and cannot cite one case where, as in
15 the instant case, a plaintiff brought *Bivens* and FTCA claims in
16 one forum; had the FTCA claims dismissed for failure to exhaust
17 administrative remedies; has *Bivens* claims currently pending in
18 the original forum; but is entitled to bring the self-same FTCA
19 claims in a different forum 3000 miles away.

20 Thomas does accurately cite federal law that related cases
21 should be transferred in order to avoid inefficiency as well as
22 the possibility of inconsistent judgments. *See* Opposition 15,
23 *citing* Continental Grain Co. v. Barge FBL-585, 364 U7.S. 19, 26
24 (1960); Xoxide Inc. v. Ford Motor Co., 448 F.Supp.2d 1188, 1194
25 (C.D.Cal. 2006)(mis-cited as 448 F.Supp.2d 1183). Both courts
26 took a practical approach which should, in this case, cause this
27 Court to transfer the Plaintiff's action to New York.
28 ///

1 The inefficiency is self evident. Thomas has admitted that
2 he brought the entire bundle of claims in New York. There is
3 evident over-lapping among witnesses, counsel for the same
4 plaintiff, counsel for the same defendants, the same discovery
5 concerning alleged sub-standard medical care, and duplicative
6 costs involved in all the above.
7 In addition, contrary to Plaintiff's suggestion, there is a
8 very real possibility of inconsistent judgments. Unless the
9 entire bundle of claims is determined in one forum, there is a
10 very real possibility that any liability will be out of
11 proportion to any actual damage, as no one fact finder will have
12 all of the relevant claims to decide what, if anything, the
13 Plaintiff is entitled to recover.
14 Using the common sense contained in Continental Grain, and
15 Xoxide, this Court should transfer Plaintiff's FTCA claims to New
16 York. As a matter of policy, the United States will not settle
17 this case piecemeal. Instead, both the *Bivens* claims and the
18 FTCA claims must be resolved in tandem. Settlement discussions
19 involving duplicative sets of Assistant United States Attorneys,
20 as well as duplicative lawyers from O'Melveny and Meyers,
21 needlessly complicate this matter. The Assistant United States
22 Attorney in the Southern District of New York handling the *Bivens*
23 action, which has been pending since 2006 and which is currently
24 engaged in discovery, is the logical choice to handle both the
25 *Bivens* claims and the FTCA claims.
26 Other than an improper attempt to have "two bites at the
27 apple," there is no reason why Thomas' FTCA claims, pending
28 before this Court, should not be transferred to the Southern

1 District of New York, where his *Bivens* claims are currently
2 pending. Accordingly, the Defendant respectfully requests that
3 this Court transfer Plaintiff's action to the Southern District
4 of New York.

5 **IV.**

6 **CONCULSION**

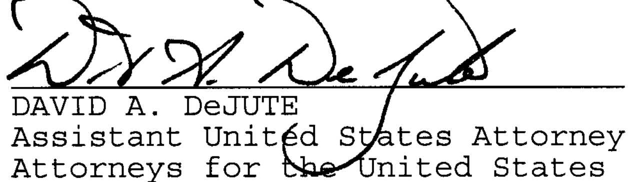
7 For the foregoing reasons, the United States respectfully
8 requests that this Court transfer Plaintiff's action to the
9 Southern District of New York.

10

11 Respectfully submitted,

12 DATED: Jan 28, 2008

THOMAS P. O'BRIEN
13 United States Attorney
LEON W. WEIDMAN
14 Assistant United States Attorney
Chief, Civil Division

15 

16 DAVID A. DeJUTE
17 Assistant United States Attorney
Attorneys for the United States

18
19
20
21
22
23
24
25
26
27
28

Thomas v. Ashcroft
S.D.N.Y.,2004.
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Rodney THOMAS, Plaintiff,
v.
John ASHCROFT, Attorney General of the United States & Director of the Department of Justice; Kathleen Hawk Sawyer, Director, Federal Bureau of Prisons; ASA Hutchinson, Administrator, Drug Enforcement Administrator; Warden Gregory Parks, Metropolitan Correction Center (New York, New York); Mark Glover, M.D., Clinical Director, MCC Medical Unit; Ulises Vargas, Health Services Administrator, Metropolitan Detention Center (Brooklyn, NY); DEA Special Agents: Scott Seeley-Hacker, John Sieder, John Ryan, Brad Clemmer, Greg Conners, Tom Cielecy, Richard Jones, and DEA G.S. Steven Woodland; and John and Jane Doe employees of the United States Federal Government (including but not limited to the Drug Enforcement Administration and the Federal Bureau of Prisons), all of the above parties being sued in their individual and official capacities, the Federal Bureau of Prisons, Metropolitan Corrections Center, and the Metropolitan Detention Center, as relevant programs receiving federal assistance, Defendants.
No. 02 Civ. 5746(CBM).

June 25, 2004.

OPINION

MOTLEY, J.

***1** Plaintiff Rodney Thomas brings this action for alleged violations of the Fifth and Eighth Amendments to the Constitution, the Due Process Clause of the Fifth Amendment to the Constitution, and the Rehabilitation Act of 1973, Section 504, *as amended,*29 U.S.C.A. § 794, and for various common law torts. Plaintiff is a federal pre-trial detainee held at the Metropolitan Correctional Center ("MCC") in New York City. He is legally blind, and has been informed that his vision will not return. He alleges that his blindness was caused by defendants' acts and omissions with respect to his medical care while in federal custody. Specifically, he alleges the unlawful confiscation at the time of his arrest, and the withholding thereafter, of medications necessary for the treatment of his glaucoma and for the preservation of his eyesight, and deliberate indifference to his need for these medications. This matter comes before the court on a motion by the named defendants to dismiss the complaint, on grounds of lack of personal and subject matter jurisdiction, and failure to state a claim, or, in the alternative, for summary judgment.[FN1] For the following reasons, defendants' motion to dismiss is granted.

FN1. The motion as originally described was a motion to dismiss the First Amended Complaint for lack of personal and subject matter jurisdiction and for failure to state claim pursuant to Rules 12(b)(1), 12(b)(6). By letter dated November 19, 2003, defense counsel requested that its motion be converted from a motion to dismiss to a motion to dismiss or, in the alterative, for summary judgment. In support of this request, it cited a recent Second Circuit decision, *Richardson v. Goord,* which held that failure to exhaust administrative remedies under the Prison Litigation Reform Act ("PLRA"), was not a jurisdictional bar. *Richardson v. Goord,* 347 F.3d 431, 434 (2d Cir.2003). The court granted that request, and in an order dated January 7, 2004, stated that it might consider the motion to dismiss as a motion for summary judgment, on the issue of exhaustion of remedies, and afforded plaintiff 10 days in which to submit materials relevant to the resolution of a summary judgment motion on the exhaustion issue.

I. BACKGROUND

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Plaintiff was diagnosed with glaucoma on March 8, 2000, and was prescribed a combination of eye drops. The drops were to be taken daily, with a ten-minute interval between each type of drop. Plaintiff was arrested and taken into custody in California on September 7, 2001, at which time, in addition to his glaucoma, he suffered from Type II diabetes, and was being treated for high blood pressure.[FN2]Plaintiff alleges that he had followed the prescribed regimen since March 8, 2000, and that at the time of his arrest, his vision was still within the normal range.

FN2. According to the complaint, "[t]he glaucoma condition suffered by Mr. Thomas at the time of his arrest is, upon information and belief, affected by his other treatable conditions of Type II Diabetes and high blood pressure. Prior to his arrest, if Mr. Thomas sugar levels were not properly monitored and/or his blood pressure was elevated, he was at risk for a loss of visual acuity."

Plaintiff alleges a catalog of actions and omissions by defendants in connection with plaintiff's health and disability, starting with his arrest. These include the confiscation of his glaucoma medication at the time of his arrest, and the prolonged failure to provide him with such medication; the loss of plaintiff's medical records; failure to administer plaintiff's glaucoma medication properly, in violation of physicians' instructions; failure to ensure medical care for plaintiff; assignment of plaintiff to a top bunk, from which he fell, despite his authorization to sleep in a bottom bunk; failure to provide consistent monitoring of plaintiff's blood sugar levels, or to meet his need for a Type II diabetic diet; denial of access to nitroclycerine or other medication or care for his heart condition; derogatory comments relating to his disability; the failure, as of the filing of the original complaint,[FN3] to assign an inmate assistant to plaintiff. These acts and omissions are alleged to have occurred in a variety of locations, through which plaintiff passed from the time of his arrest, including Los Angeles, where the arrest took place, and MCC and the Metropolitan Detention Center ("MDC"), the two New York facilities at which plaintiff has been held.[FN4]

FN3. Plaintiff filed his original complaint on July 23, 2002. He filed an amended complaint on February 7, 2003.

FN4. According to the Reply Declaration of Adam M. Johnson, "Plaintiff first arrived at a Bureau of Prisons institution, specifically the Federal Transfer Center in Oklahoma City, Oklahoma, on October 4, 2001. Plaintiff then transferred to the United States Penitentiary in Atlanta, Georgia, on October 10, 2001, and to MCC New York on October 11, 2001."

***2** Plaintiff arrived at MCC on or about early October, 2001. Plaintiff alleges that by this time he had been "virtually without his glaucoma medication for a month," and that "[o]n those occasions when the glaucoma medication was obtained and administered, proper care was rarely taken to follow the requisite sequence and time intervals in applying the eye drops."As an example, a physician's assistant employed by the federal government on one occasion "handed Mr. Thomas his second eye drop with a missing spout which caused the medication to pour into Mr. Thomas's eye and brought on an intense burning sensation. When Mr. Thomas asked permission to rinse his eye out in the kitchen, he was denied and instructed to rinse his eye out in the shower."On January 4, 2002, a doctor at New York Eye & Ear Clinic indicated on a Consultation Sheet sent to MCC that "... Patient did not receive meds at facility today. Patient high risk for blindness w/no meds ..."

On May 20, 2002, plaintiff was transferred from MCC to the psychiatric unit of the MDC in Brooklyn, where he stayed for approximately two weeks, before being returned to MCC. Plaintiff alleges that during those two weeks, he received no medication to relieve his optic pressure. Rather, he alleges, staff at MDC handed him empty eye drop bottles for three consecutive days. Plaintiff alleges that during that two-week period he experienced a

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

popping sensation in his right eye, after which his eye would not stop watering, and the pain increased severely. Plaintiff alleges that his request that MDC staff arrange a visit to New York Ear & Eye Clinic was denied.

On the day that he was finally returned to MCC, plaintiff alleges that a physician's assistant at MCC brought him the same medication that had been empty over a week previously at MDC. Plaintiff also alleges that on or about December 2002, when he began experiencing chest pains, he was told by federal employees at MCC that no nitroglycerine tablets were available, that there was no record of his ever having been given nitroglycerine, and that he would be required to find a used bottle of nitroglycerine to prove to staff that he had been given such medicine before. The complaint continues:

When Mr. Thomas did not receive any nitroglycerine, he found himself on the floor. When his fellow inmates complained to staff, they were threatened. One staff member was heard singing, as Mr. Thomas lay on the floor, 'I've fallen and I can't get up.'

Upon his arrival at the outside hospital emergency room, the treating physician expressed anger and disbelief at the time elapsed before Mr. Thomas was transported, stating in substance: 'This man had chest pains before last night and you bring him in here now?'

Plaintiff also alleges that during his time at MCC, he has been forced to wear the same eye patch for longer than ten days, despite the fact that MCC staff have been directed by physicians to make certain that it is changed every other day.

*3 Plaintiff seeks declaratory and injunctive relief, as well as compensatory and punitive damages. His causes of action can be grouped as follows:

I. Fifth/Eighth Amendment-denial of medical care. Eight named Drug Enforcement Administration ("DEA") agents, Gregory Parks, Mark Glover, and Ulises Vargas, are alleged, from the time of plaintiff's arrest on September 7, 2001, when they confiscated his medicine, and refused to respond to plaintiff's appeals that it be returned to him, to have acted with deliberate indifference to plaintiff's serious medical needs, resulting in plaintiff's permanent loss of sight. In addition, plaintiff alleges the failure of defendants regularly to monitor plaintiff's blood sugar levels and to provide a diet which controls plaintiff's Type II Diabetes, and the denial of plaintiff's access to nitroglycerine and/or other medicines or care procedures appropriate for the treatment of plaintiff's heart condition. This claim is brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999 (1971).

II. Medical malpractice, gross negligence in supervising subordinates, negligence in failing to provide reasonable and adequate medical care, and intentional and/or negligent infliction of emotional distress. This cause of action is based on the allegations that underlie the claim of denial of medical care.

III. Fifth Amendment Procedural Due Process. Plaintiff alleges that defendants "den[ied], ignor[ed] and stonewall[ed]" plaintiff's verbal and administrative complaints and requests for adequate medical care for his glaucoma, diabetes, blood pressure and heart condition, made from the date of his arrest on September 7, 2001. The complaint makes specific reference to complaints communicated by plaintiff and his attorney in federal criminal court proceedings, and complaints made verbally by plaintiff to MCC and MDC staff (including defendants Parks, Glover, and Vargas). This claim is brought pursuant to *Bivens,* 403 U.S. 388, 91 S.Ct. 1999 (1971).

IV. Rehabilitation Act. Plaintiff alleges a failure by the Bureau of Prisons ("BOP"), MCC and MDC to provide plaintiff with necessary medical care, and the required support mechanisms to insure that he would not be denied the benefits of relevant services, activities and programs, or be subject to discrimination by relevant bodies. Plaintiff alleges that none of these defendants took steps to insure that his particularized and unique medical needs, as a qualified individual with a disability, were reasonably and adequately cared for, that he was assigned an inmate assistant to assist him in particip-

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ating in the grievance process and in performing legal tasks to assist his criminal attorney in defending him, in order to avoid unnecessary discrimination and/or lack of access to the services available to pre-trial detainees due to his status as a qualified individual with a disability.

II. DISCUSSION

Subject Matter Jurisdiction

1. *Rule 12(b)(1)*

***4** A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000). If a defendant challenges only the legal sufficiency of the plaintiff's allegations, the court must take all facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 140 (2d Cir.2001). In resolving a motion to dismiss for lack of subject matter jurisdiction, the court may refer to evidence outside the pleadings. *Makarova,* 201 F.3d at 113. A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists. *Id.* Where the district court "relies solely on the pleadings and supporting affidavits, the plaintiff need only make a *prima facie* showing of jurisdiction."*Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 507 (2d Cir.1994) [hereinafter *Robinson*].

2. *Sovereign Immunity*

Absent a waiver, sovereign immunity shields the federal government and its agencies from suit. *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996, 1000 (1994). Sovereign immunity is jurisdictional in nature. *Id.* Indeed, the "terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* (quoting *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 770 (1941)).

a. Bivens *claims*

In a *Bivens* action, alleged victims of constitutional violations by federal officials may recover damages despite the absence of any statute specifically conferring such a cause of action. *Robinson,* 21 F.3d at 510. Such an action, however, must be brought against the federal officers in their individual capacities. *Id.* Because an action against a federal agency or federal officers in their official capacities is essentially a suit against the United States, such suits are barred under the doctrine of sovereign immunity, unless such immunity is waived. *Id.*

In a *Bivens* claim, "public officials may be held responsible only to the extent that they caused the plaintiff's rights to be violated; they cannot be held liable for violations committed by their subordinates or predecessors in office."*Leonhard v. United States,* 633 F.2d 599, 621 n. 30 (2d Cir.1980) (affirming dismissal of action where plaintiff had failed to allege that defendants participated personally in the alleged constitutional deprivation).

b. *Federal Tort Claims Act*

The Federal Tort Claims Act ("FTCA") waives the sovereign immunity of the United States for certain torts committed by federal employees. 28 U.S.C. § 1346(b).Section 1346(b) provides:

"[T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[FN5]

FN5. The Second Circuit has held as follows with regard to the phrase "within the scope of his office or employment:"

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Whether an act is included within the scope of an agent's employment is determined by a broad, two-pronged test. We must determine, first, whether there is a reasonable connection between the act and the agent's duties and responsibilities and, second, whether the act is "not manifestly or palpably beyond the [agent's] authority."*Yalkut v. Gemignani,* 873 F.2d 31, 34 (2d Cir.1989) (quoting *Nietert v. Overby,* 816 F.2d 1464, 1466 (10th Cir.1987)).

***5** The Federal Employees Liability Reform and Tort Compensation Act of 1988 limits the relief available to people injured by government employees acting within the scope of their employment. For persons so injured, the Act provides that "[t]he remedy against the United States" under the FTCA "is exclusive of any other civil action or proceeding for money damages."28 U.S.C. § 2679(b)(1). This provision does not apply to suits for violation of federal constitutional or statutory rights, *see id.* § 2679(b)(2), but provides government employees with immunity against claims of common law tort.

The FTCA elsewhere provides that "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive."28 U.S.C. § 2679(a). Thus, if a suit is "cognizable" under 1346(b) of the FTCA, the FTCA remedy is "exclusive" and the federal agency cannot be sued "in its own name." *Meyer,* 510 U.S. at 476, 114 S.Ct. at 1001.

c. *Rehabilitation Act*

Section 504(a) of the Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. § 791*et seq.* ("Rehabilitation Act"), provides in relevant part as follows:

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a).

Section 505(a)(2) of the Act describes the remedies available for a violation of Section 504(a):

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.2000d*et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." § 794a(a)(2).

Although Title VI provides for monetary damages awards, the Supreme Court has held that the statutory language of the Rehabilitation Act fails to establish a Congressional waiver of the Federal Government's immunity against monetary damages awards beyond the "narrow category of § 504(a) violations committed by federal funding agencies acting as such-that is, by 'Federal provider[s].'" ' *Lane v. Pena,* 518 U.S. 187, 193, 116 S.Ct. 2092, 2097 (1996) (declining to read "Federal provider[s]" to include not only the funding activities of those providers, but rather "any act" of an agency that serves as a "Federal provider" in any context.).

Personal Jurisdiction

1. *Rule 12(b)(2)*

The Second Circuit has characterized as follows plaintiff's burden on the issue of personal jurisdiction:

***6** The plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwith-

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

standing the contrary presentation by the moving party.

Seetransport Wiking Trader Schiffarhtgesellschaft MBH v. Navimpax Centrala Navala, 989 F.2d 572, 580 (2d Cir.1993).

2. *State law*

Personal jurisdiction of a federal court over a non-resident defendant is governed by the law of the state in which the court sits-subject to certain constitutional limitations of due process. *Robinson,* 21 F.3d at 510. The relevant provision of New York law, N.Y. CPLR § 302, provides, in part, as follows:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; ...

Rule 12(b)(6) -Failure to State a Claim

On a motion to dismiss for failure to state a claim, a court must read the complaint generously, and draw all inferences in favor of the pleader.*Cosmas v. Hassett,* 886 F.2d 8, 11 (2d Cir.1989). The court must accept as true the material facts alleged in the complaint. *Grandon v. Merrill Lynch,* 147 F.3d 184, 188 (2d Cir.1998). The court must not dismiss the action unless " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ' *Cohen v. Koenig,* 25 F.3d 1168, 1172 (2d Cir.1994) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957)); *Sims v. Artuz,* 230 F.3d 14, 20 (2d Cir.2000). In deciding such a motion, the "issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Bernheim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996) (internal quotations omitted). The court must limit itself to a consideration of the facts alleged on the face of the complaint, and to any documents attached [to the complaint] as exhibits or incorporated in it by reference. *Cosmas,* 886 F.2d. at 13. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint "relies heavily upon its terms and effect," which renders the document "integral" to the complaint. *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir.2002). If, as in the present case, extraneous material is presented by the parties, the court must exclude it from consideration. *See*Fed.R.Civ.P. 12(b).

Exhaustion of Administrative Remedies

1. *Prison Litigation Reform Act*

***7** Under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C.A. § 1997e(a), "No action shall be brought with respect to prison conditions under section § 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."Under § 1997e(h), "Prisoner" is defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."The exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."*Porter v. Nussle,* 534 U.S. 516, 532, 122 S.Ct. 983, 992 (2002). Exhausting administrative remedies after suit is filed is insufficient. *Neal v. Goord,* 267 F.3d 116, 122 (2d Cir.2001). The Supreme Court has held as follows with respect to this provision:

Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory. All "available" remedies must now be exhausted; those remedies need not meet federal standards, nor must they be "plain, speedy, and effective." Even when the prisoner seeks relief not

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. And unlike the previous provision, which encompassed only § 1983 suits, exhaustion is now required for all "action[s] ... brought with respect to prison conditions," whether under § 1983 or "any other Federal law." Thus federal prisoners suing under *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), must first exhaust inmate grievance procedures just as state prisoners must exhaust administrative processes prior to instituting a § 1983 suit.

Porter, 122 S.Ct. at 988, 534 U.S. at 524 (internal citations omitted.).

The Second Circuit has recently held that exhaustion of administrative remedies under the PLRA is not jurisdictional. *Richardson v. Goord,* 347 F.3d 431, 434 (2d Cir.2003).

As regards the dismissal of PLRA claims, Section 1997e(c) of the PLRA provides in relevant part:

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, [or] fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, [or] fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring exhaustion of administrative remedies. 42 U.S.C. § 1997e(c).

2. *Federal Tort Claims Act*

***8** The FTCA requires that a claimant against the federal government file an administrative claim with the appropriate agency prior to institution of suit. Thus, 28 U.S.C. § 2675(a) provides in pertinent part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

The requirement that a notice of claim be filed is jurisdictional and cannot be waived. *Keene Corp. v. United States,* 700 F.2d 836, 841 (2d Cir.1983). Moreover, "because the FTCA constitutes a waiver of sovereign immunity, the procedures set forth in Section 2675 must be adhered to strictly."*Id.*

Defendants have supplied a declaration from Adam M. Johnson, a BOP employee at MCC. Mr. Johnson has access to "documentary materials regarding Administrative Tort Claims maintained by the Bureau of Prisons in the ordinary course of business."Mr. Johnson reports that plaintiff submitted an Administrative Tort Claim to the Northeast Regional Office of the BOP on June 23, 2003. Plaintiff included many of the same claims as those alleged in the instant suit,[FN6] and named as the injury his irremediable blindness. The record gives no indication that plaintiff has received a response.

FN6. The claim contains the following allegations:

"At the time of his arrest by New York-based DEA agent Scott Seeley-Hacker (and other DEA agents based in Los Angeles) on a federal criminal complaint executed in the Southern District of New York, claimant was forcibly deprived of his glaucoma medications. Following claimant's arrest and incarceration, unknown DEA and unknown BOP

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

federal employees failed to respond to claimant's persistent requests that his glaucoma medications be restored. During the first stage of Mr. Thomas's incarceration in southern California, he was locked in a facility located in Kern County. As a result the failure of federal employees to comply [sic] with DEA and BOP policies to provide a reasonable standard of medical care in treating claimant's serious glaucoma condition, claimant lost his vision and is now blind.

In October 2001, claimant was transported from California to Metropolitan Correction Center in New York, New York. MCC Clinical Director, Mark Glover, M.D., Metropolitan Detention Center Health Services Director, Ulises Vargas, and the clinic staff employees at both MDC and MCC failed to comply with BOP policy of providing reasonable medical care by continuously failing to administer claimant's glaucoma medication as prescribed and by failing to provide claimant with a proper diabetic diet. There is now no reasonable prognosis that plaintiff's vision will ever be restored."

Denial of Medical Care

The "cruel and unusual punishments" proscription of the Eighth Amendment does not apply to pre-trial detainees such as plaintiff. *Cuoco v. Moritsugu,* 222 F.3d 99, 106 (2d Cir.2000). Plaintiff's claims arise, instead, under the Due Process Clause of the Fifth Amendment. *Id.* However, the Eighth Amendment deliberate indifference test is applied to pre-trial detainees bringing actions under the Due Process Clause of the Fifth Amendment. *Id.* According to that standard, plaintiff's action lies if the defendants denied him "treatment needed to remedy a serious medical condition and did so because of [their] deliberate indifference to that need."*Id.* (quoting *Weyant v. Okst,* 101 F.3d 845, 856 (2d Cir.1996)). There are, therefore, two elements to plaintiff's claim: he must show that he had a "serious medical condition" and that it was met with "deliberate indifference." *Id.*

A serious medical condition exists where the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. *Harrison v. Barkley,* 219 F.3d 132, 136 (2d Cir.2000) (internal quotation omitted); *see id.* at 137 (holding that "because a tooth cavity will degenerate with increasingly serious implications if neglected over sufficient time, it presents a 'serious medical need' within the meaning of our case law.") Relevant factors in determining whether a serious medical condition existed include "the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain."*Graham v. Perez,* 121 F.Supp.2d 317, 325 (S.D.N.Y.2000) (quoting *Chance v. Armstrong,* 143 F.3d 698, 702 (2d Cir.1998) (internal quotation marks and citations omitted)).

***9** To establish deliberate indifference, "a plaintiff must show 'something more than mere negligence'; but proof of intent is not required, for the deliberate indifference standard 'is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." ' *Weyant,* 101 F.3d at 856 (quoting *Farmer v. Brennan,* 511 U.S. 825, 835, 114 S.Ct. 1970 (1994)). "An official acts with the requisite deliberate indifference when that official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." ' *Chance,* 143 F.3d at 702 (quoting *Farmer,* 511 U .S. at 837, 114 S.Ct.1970). " '[M]ere medical malpractice' is not tantamount to deliberate indifference," but it may rise to the level of deliberate indifference when it "involves culpable recklessness, i.e., an act or a failure to act ... that evinces 'a conscious disregard of a substantial risk of serious harm." ' *Id.* at 703 (quoting *Hathaway v. Coughlin,* 99 F.3d 550, 553 (2d Cir.1996) (internal quotation marks omitted)). "Deliberate indifference" may be manifested "by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intention-

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ally interfering with the treatment once prescribed." *Estelle v. Gamble,* 429 U.S. 97, 104-05, 97 S.Ct. 285, 291 (1976).

Application to Plaintiff's Claims

1. *Claims against the Named D.E.A. Agents*

Plaintiff has failed to sustain his burden of showing that the court has personal jurisdiction over the eight named D.E.A. agents.[FN7]In this connection, the complaint describes these defendants as "New York-based DEA agents," and alleges that plaintiff "has personal jurisdiction by virtue of *diversity of citizenship* against all named defendant DEA agents who obtained a wire-tap authorization from the United States District Court in the Southern District of New York, initiated an investigation in New York and filed a criminal complaint against Mr. Thomas in the Southern District of New York based on said New York investigation, thereafter travelling to California to place Mr. Thomas under arrest and return him to MCC in New York City, New York."(emphasis in original).[FN8] Even if we interpret plaintiff as attempting to rely on New York's long-arm statute, under which a court may exercise personal jurisdiction over a non-domiciliary who "transacts any business within the state," provided that the cause of action arises from that transaction of business, plaintiff fails in his attempt. NY CPLR § 302. Plaintiff's claims against these defendants arise from acts alleged to have occurred at the time of plaintiff's arrest, which took place in California, and not from any transaction of business within New York.

FN7. The Court also lacks personal jurisdiction over the John and Jane Doe defendants, none of whom has been served with process. *See Omni Capital Int'l v. Rudolf Wolff,* 484 U.S. 97, 104, 108 S.Ct. 404, 409 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.").

FN8. The complaint includes another paragraph bearing on the question of the Court's personal jurisdiction over DEA Special Agent Scott Seeley-Hacker: "DEA Special Agent Scott Seeley-Hacker signed and swore, as deponent, to a sealed criminal complaint before Henry Pitman, United States Magistrate Judge of the Southern District of New York, in September, 2001, which complaint was based on allegations of offenses in New York County arising from an investigation centered in New York County. Mr. Seely-Hacker [sic] is also the deponent named on the Affidavit in Support of Application for Authorization to Intercept Wire Communications. This wire tap application was granted by a judge for the United States District Court of the Southern District of New York on July 13, 2001. The affidavit seeks authority to surveil a cellular telephone based in New York County. After the wire-tap application was granted, an investigation was conducted in New York County by agent Seeley-Hacker (and, upon information and belief, the other identified DEA agents). Agent Seeley-Hacker's investigation resulted in Mr. Thomas's arrest in Los Angeles, California. Agent Seeley-Hacker, GS Steven Woodland and, upon information and belief, the other named agents, travelled to California to arrest Mr. Thomas. Agent Seeley-Hacker, witnessed by G.S. Steven Woodland, on 9.7.01, at approximately 11:30 AM, arrested Mr. Thomas at his business located on Crenshaw Blvd. in Los Angeles, California."

***10** In a Memorandum of Law dated May 16, 2004, plaintiff made a further attempt to establish that the Court has personal jurisdiction over these defendants. However, that submission was invited for the sole purpose of addressing the issue of exhaustion of administrative remedies, and it is for that purpose alone that the submission has been considered. The claims against these defendants, are dismissed pursuant to Rule 12(b)(2).

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

2. *Claims against Ashcroft, Sawyer, Hutchinson, Parks, Glover, Vargas*

Plaintiff's claims against the remaining individual named defendants must also be dismissed. At the outset, we note that the constitutional claims against these defendants in their *official* capacities must be dismissed for want of subject matter jurisdiction, according to the restrictions on *Bivens* actions.[FN9] *Robinson,* 21 F.3d at 510. Further, *Bivens* claims are dismissed where they fail to allege violations in which the defendants, as opposed to their subordinates, participated. *See Leonhard,* 633 F.2d at 621 n. 30. Plaintiff's claims are unsupported by factual allegations of personal involvement in wrongdoing by any of these six defendants. No allegations at all are made against Ashcroft, Sawyer, or Hutchinson, and it is "well-settled that 'where the complaint names a defendant in the caption but contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint in regard to that defendant should be granted." ' *Dove v.. Fordham Univ.,* 56 F.Supp.2d 330, 335 (S.D.N.Y.1999) (quoting *Morabito v. Blum,* 528 F.Supp. 252, 262 (S.D.N.Y.1981)). The conclusory nature of the references to Parks, Glover, and Vargas can be seen from what follows.

FN9. The same is true of the *Bivens* claims against the named D.E . A. Agents.

The complaint states that "[t]he refusal of federal employee John Does, Warden Parks, and Clinical Director Mark Glover, M.D., to insure the proper administration of Mr. Thomas's eye medications amounts to deliberate indifference to Mr. Thomas's serious medical needs and is a significant causative element in Mr. Thomas's blindness."The complaint also includes the following paragraph:

Warden Parks was placed on notice that plaintiff required medical attention for glaucoma and enlarged heart by a United States Magistrate Judge on 10.12.01, shortly after Mr. Thomas arrived at MCC. Dr. Glover has acknowledged, by his testimony in federal court, his awareness that a particularized and complex regimen exists in relation to the administration of plaintiff's glaucoma medications. Dr. Glover also heard testimony in federal court that the prescribed regimen for plaintiff's glaucoma medications was recklessly implemented at best.

The complaint also states, with regard to plaintiff's transfer to the psychiatric unit of MDC that "[u]pon information and belief, this transfer was either directed by and/or acquiesced in by defendants Warden Parks of MCC, Clinical Director Mark Glover of MCC, MDC Health Services Administrator Vargas and/or, the subordinate unnamed John Does at MCC and MDC who were supervised by Parks, Glover and Vargas."

***11** The complaint also states that "[t]he failure to insure that plaintiff's glaucoma medications ... travelled with Mr. Thomas to MDC was either malice or deliberate indifference to plaintiff's serious medical needs by defendants Warden Parks, Clinical Director Glover, and unnamed John Does," and that "[t]he failure of MDC defendants John Does and Health Services Administrator Ulises Vargas to treat plaintiff's elevated optic nerve pressure by properly administering plaintiff's glaucoma medications, was either malicious or deliberate indifference to plaintiff's serious medical needs and a proximate cause of plaintiff's irrevocable blindness."

The complaint states that "[t]he inaction of defendants John Doe federal employees 36 through 45 and Health Services Administrator Vargas in remaining deliberately indifferent to plaintiff's requests for treatment was both an act of medical malpractice and a violation of plaintiff's constitutional right to receive reasonably adequate medical care."It also states that "[t]he action by [an MCC Physician's Assistant who is alleged to have brought plaintiff, for the second time, an empty container of medication] and by Clinical Director Mark Glover, M.D., was an action of deliberate indifference to plaintiff's serious medical needs."

Out of these allegations, only one contains a possible allegation of personal involvement, and

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

even that allegation is hedged with caution. The allegation is that plaintiff's transfer to MDC's psychiatric unit was "either directed by and/or acquiesced in by defendants Warden Parks of MCC, Clinical Director Mark Glover of MCC, MDC Health Services Administrator Vargas and/or, the subordinate unnamed John Does at MCC and MDC who were supervised by Parks, Glover and Vargas."This does not suffice to state a claim against any of these defendants.

The *Bivens* prohibition against allegations that rely upon a theory of respondeat superior does not, of course, apply to plaintiff's common law tort claims. These, however, must be dismissed for lack of subject matter jurisdiction.[FN10]The United States is the only proper defendant in a tort claim for money damages against federal employees acting within the scope of their employment. *See*28 U.S.C. § 2679(b)(1). Plaintiff's allegations against these defendants undoubtedly relate to actions taken within the scope of their employment. *See*28 U.S.C. § 1346(b). Yet even if plaintiff had brought his claim against the United States, he would have fallen at the hurdle of administrative exhaustion, since the FTCA provides that an action for money damages against the United States may not be instituted "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency ..."28 U.S.C. § 2675(a); *see Robinson,* 21 F.3d at 510 (holding that because the plaintiff "failed to first present his claim to the appropriate agency, the district court properly dismissed his tort claims for want of subject matter jurisdiction."). Plaintiff's Administrative Tort Claim, which, according to the record before us, appears not to have received a response, was submitted to the Northeast Regional Office of the BOP on June 23, 2003, subsequent to the filing of the instant lawsuit.[FN11]Therefore, plaintiff failed to satisfy the exhaustion requirement.

FN10. The same is true of the *Bivens* claims against the named D.E.A. Agents.

FN11.28 U.S.C. § 2675(a) provides that "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section."Plaintiff has not taken this option.

***12** We note that in his complaint plaintiff "reserves the right" to bring an FTCA claim. Plaintiff's tort claims are dismissed without prejudice to the refiling of a tort claim that names the United States as defendant, and complies in all other regards with the provisions of the FTCA, once the relevant administrative remedies have been exhausted.

3. *Claims against BOP, MCC, MDC*

Plaintiff's claims must also be dismissed with respect to the three institutional defendants. The constitutional claims must be dismissed because a *Bivens* claim can only be brought against federal officers in their individual capacities. *See Robinson,* 21 F.3d at 510. The tort claims must be dismissed because the United States, rather than federal agencies or institutions, is the only proper defendant in a suit of this nature seeking monetary damages. *See*28 U.S.C. § 2679(b)(1). As for the Rehabilitation Act claim, the Supreme Court has declined to find that the Act waives the immunity of federal agencies from suits seeking monetary damages, other than in situations where the defendant agency is sued in its capacity as a "Federal provider." *Lane,* 518 U.S. 187, 116 S.Ct. 2092. Plaintiff does not offer any indication or argument that any of the institutional defenders is a "Federal provider" within the meaning of the Act. Plaintiff's claims are therefore dismissed pursuant to Rule 12(b)(1).

III. CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed in its entirety. Plaintiff's tort claims are dismissed without prejudice to their refiling, in accordance with the provisions of the FTCA, upon

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

exhaustion of the relevant administrative remedies.

S.D.N.Y.,2004.
Thomas v. Ashcroft
Not Reported in F.Supp.2d, 2004 WL 1444735 (S.D.N.Y.)

END OF DOCUMENT

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.