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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY KONTOS,)	Case No. EDCV 13-01398 DDP (KESx)
)	
Plaintiff,)	ORDER GRANTING PLAINTIFF'S MOTION
)	FOR LEAVE TO FILE AMENDED
v.)	COMPLAINT TO REVIVE FTCA CLAIM
)	
UNITED STATES OF AMERICA, et)	[Dkt. No. 75]
al.,)	
)	
Defendants.)	
_____)	

Presently before the Court is Plaintiff Anthony Kontos's Motion for Leave to File an Amended Complaint. (Dkt. No. 75.) Plaintiff recently found counsel to represent him, leading to the filing of this Motion in an attempt to revive Plaintiff's Federal Torts Claim Act ("FTCA") cause of action against the United States. (Id.) The Government opposes this motion. (Dkt. No. 78.) Finding this matter suitable for decision without oral argument, the Court adopts the following Order based on the parties' submissions.

I. BACKGROUND

This case began as a civil rights case filed by pro se Plaintiff Anthony Kontos. (See generally Compl., Dkt. No. 4.) Plaintiff asserted claims against various defendants, including the

1 United States, based on alleged violations of his Eighth Amendment
2 rights. (Id.) Plaintiff alleged he received inadequate medical
3 care when he was in federal custody. (Id.) This medical care was
4 necessary because Plaintiff suffered a debilitating eye and face
5 injury after another inmate threw a rock at Plaintiff's eye. (Id.)

6 Plaintiff acknowledged in his original complaint that he was
7 unclear on the exact legal and procedural process required to make
8 his claims, stating that he was pursuing an administrative claim
9 with the Federal Bureau of Prisons ("BOP"). (Id. at 2.) Plaintiff
10 attached his FTCA Form 95 Tort Claim to his complaint. (Id.)
11 Plaintiff also stated that he filed the complaint so as to make
12 sure he would not be time barred for his tort and Bivens claims.
13 (Id. at 2-3.)

14 The Magistrate Judge screening Plaintiff's pro se complaint
15 issued a detailed order dismissing the complaint with leave to
16 amend, explaining how and what Plaintiff had to amend. (See
17 generally Order, Dkt. No. 2.) Plaintiff filed a First Amended
18 Complaint thereafter. (Dkt. No. 11.) This was also dismissed with
19 leave to amend based on the Magistrate Judge's instructions. (Dkt.
20 No. 12.) Plaintiff then filed a Second Amended Complaint. (Dkt.
21 No. 13.) Then, the Magistrate Judge ordered Plaintiff to serve the
22 parties the Magistrate understood to be the three remaining
23 Defendants: Sterling, Quinn, and Ortiz. (Dkt. No. 15.) After some
24 issues with service, Plaintiff served these three individuals, as
25 well as serving the U.S. Attorney General, the U.S. Attorney in Los
26 Angeles, California, and the prison where the events at issue in
27 the case occurred. (Dkt. Nos. 21, 22.)

28

1 The United States and the three individual Defendants filed
2 several ex parte applications for an extension of time to respond
3 to the complaint. (Dkt. Nos. 24, 31, 39.) The Defendants then
4 filed a motion to dismiss under Federal Rule of Civil Procedure
5 ("FRCP") 12, arguing in part that the United States should be
6 dismissed from the case because Plaintiff had no FTCA claims in the
7 Second Amended Complaint. (Mot. Dismiss, Dkt. No. 38, at 11-12.)
8 Plaintiff opposed the Motion, stating that he was confused about
9 the United States' argument because "at least to Kontos this Court
10 has made it abundantly clear the United States already was
11 protected by sovereign immunity" and that the Court "explicitly
12 instructed [Plaintiff] that he was not to sue the United States
13 Government" in the Order dismissing Plaintiff's original complaint.
14 (Opp'n, Dkt. No. 43, at 18-20.) Plaintiff stated he thought this
15 order was in error and that he "would have the Defendants know that
16 had the Court not advised him thusly that he would have vigorously
17 sought to sue the United States in this instant matter and should
18 this court allow him to do so, Kontos would make any amendment or
19 claim necessary to do so forthwith." (Id. at 19-20; see also id.
20 at 14.)

21 The Magistrate Judge issued a Report and Recommendation on the
22 motion that did not address the United States. (Dkt. No. 49.)
23 Both Plaintiff and Defendants filed objections to the Report.
24 (Dkt. Nos. 54, 55.) This Court accepted the findings and
25 recommendations of the Magistrate Judge in an Order on October 15,
26 2015. (Dkt. No. 61.) This Order (1) granted the motion to dismiss
27 as to Defendant Sterling with leave to amend; (2) denied the motion
28 as to Defendants Quinn and Ortiz; and (3) ordered Quinn and Ortiz

1 to file an answer and Plaintiff to amend the complaint to a Third
2 Amended Complaint against Sterling. (Id.)

3 The Magistrate Judge granted Defendants extensions of time to
4 answer the complaint. (Dkt. No. 65.) They filed their answer on
5 December 14, 2015. (Dkt. No. 68.) Thereafter, the case was
6 referred to settlement. (Dkt. No. 69.) In February 2016,
7 Plaintiff obtained counsel to represent him. (See Dkt. No. 70 (Pro
8 Hac Vice Application).) Plaintiff, newly represented, filed a
9 Motion for Leave to File an Amended Complaint to Revive FTCA Claim
10 on March 17, 2016. (Dkt. No. 75.) The case was then referred to
11 this Court for proceedings. The Government opposed the motion.
12 (Dkt. No. 78.)

13 **II. LEGAL STANDARD**

14 FRCP 15(a) provides for leave to amend a pleading in two ways:
15 (1) as a matter of right and (2) with the party's consent or the
16 court's permission. Fed. R. Civ. P. 15(a). "The court should
17 freely give leave when justice so requires." Fed. R. Civ. P.
18 15(a)(2). Leave to amend should be granted with "extreme
19 liberality" in order "to facilitate decision on the merits, rather
20 than on the pleadings or technicalities." United States v. Webb,
21 655 F.2d 977, 979 (9th Cir. 1981) (internal quotation omitted).
22 However, "when a district court has already granted a plaintiff
23 leave to amend, its discretion in deciding subsequent motions to
24 amend is particularly broad." Chodos v. West Publ'g Co., 292 F.3d
25 992, 1003 (9th Cir. 2002) (internal quotation omitted).

26 Despite the liberal amendment standard of FRCP 15(a), leave to
27 amend "is not to be granted automatically." Jackson v. Bank of
28 Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). The court "considers

1 the following five factors to assess whether to grant leave to
2 amend: (1) bad faith, (2) undue delay, (3) prejudice to the
3 opposing party, (4) futility of amendment, and (5) whether
4 plaintiff has previously amended his complaint." In re W. States
5 Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 738 (9th Cir.
6 2013) (internal quotation omitted).

7 "[T]he general rule that parties are allowed to amend their
8 pleadings . . . does not extend to cases in which any amendment
9 would be an exercise in futility or where the amended complaint
10 would also be subject to dismissal. Futility alone can justify a
11 court's refusal to grant leave to amend." Novak v. United States,
12 795 F.3d 1012, 1020 (9th Cir. 2015) (internal quotation and
13 citation omitted). "However, a proposed amendment is futile only
14 if no set of facts can be proved under the amendment to the
15 pleadings that would constitute a valid and sufficient claim or
16 defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th
17 Cir. 1988).

18 **III. DISCUSSION**

19 **A. Plaintiff's Motion**

20 Plaintiff argues that the Court should grant him leave to
21 amend his complaint and revive his original FTCA claim. (Mot.
22 Amend at 1.) Plaintiff's two-year pro se process of writing
23 multiple complaints as ordered by the Magistrate Judge led him to
24 drop his FTCA claims through confusion, despite his original
25 inclusion of the claims in order to avoid a time bar and his
26 subsequent exhaustion of the administrative procedures. (Id.)
27 Plaintiff acknowledges that the First Amended and Second Amended
28 Complaints do not specifically list the FTCA claims after the

1 Magistrate Judge's first order to amend the complaint. (Id. at 2.)
2 But the complaints do include the United States as a Defendant and
3 Plaintiff did serve the complaint on the United States. (Id.)
4 Further, in the Motion to Dismiss, the United States is listed as a
5 Defendant and Plaintiff made arguments about his FTCA claim in his
6 opposition. (Dkt. No. 43, at 14, 18-20.) The Court's October 29,
7 2014 Minute Order regarding Plaintiff's question about his FTCA
8 claim demonstrates that Plaintiff, as a pro se Plaintiff amending
9 his complaints various times, was confused as to the status of his
10 FTCA claim, but never intended to waive it. (See Mot. Amend at 3.)

11 Plaintiff argues that he properly filed his administrative
12 claim with the BOP, which he attached to his original complaint.
13 (Id. at 4.) However, Plaintiff did not state in his pro se
14 original complaint that six months had passed since Plaintiff filed
15 his administrative complaint. (Id.) Plaintiff argues that the
16 six-month time period had been completed during the time that this
17 case was pending and going through two years of complaint
18 amendments. (Id. at 4-5.) Plaintiff claims that there is no
19 prejudice to the United States here because the Government was
20 always named as a Defendant, the facts underlying the causes of
21 action are the same, and service was completed on the United
22 States. (Id.) Thus, injustice to Plaintiff would be avoided and
23 no prejudice done to Defendant United States if Plaintiff is
24 allowed to amend his complaint and reassert his FTCA claims. (Id.
25 at 6.)

26 **B. Defendant's Opposition**

27 The United States argues that any amendment would be futile
28 because Plaintiff's FTCA claims are time barred; thus, leave to

1 amend should be denied. (Opp'n at 1.) The FTCA has both an
2 administrative exhaustion requirement (28 U.S.C. § 2675(a)) and a
3 statute of limitations requirement (28 U.S.C. § 2401(b)).
4 According to Defendant, these requirements provide the window for
5 filing a suit under the FTCA for a common law tort action based on
6 the actions of federal employees in the scope of their employment.
7 (See Opp'n at 1.) Under this scheme, a plaintiff must first
8 present the claim administratively; until the agency finally denies
9 the claim, no civil action can be filed. (Id. at 2.) After the
10 claim is denied, the action must be filed in federal court within
11 six months or the cause of action is barred. (Id.)

12 Here, Defendant argues, Plaintiff submitted his administrative
13 tort claim on June 21, 2013. (Id. (citing Dkt. No. 4 at 11.)
14 Thus, Defendant argues that Plaintiff had to wait until his claim
15 was denied by the agency or at least six months had passed before
16 filing in district court. (Id. (citing § 2675(a)).) Plaintiff
17 filed his original complaint on August 20, 2013, which was too soon
18 under the administrative exhaustion requirement. Plaintiff's next
19 filings were his First Amended Complaint on October 24, 2013, and
20 his Second Amended Complaint on December 5, 2013. However, six
21 months after Plaintiff presented his administrative claim would
22 have been December 21, 2013, and thus all these complaints were
23 still premature. (Id.)

24 On May 14, 2014, the BOP denied Plaintiff's administrative
25 tort claim, and thus he had six months from this date to file his
26 complaint under the FTCA in federal court. (Id. at 3.) This
27 window closed on November 14, 2014. (Id.) Plaintiff referenced
28 his FTCA claim in his opposition to Defendants' Motion to Dismiss,

1 but indicated that he did not have an active FTCA claim at that
2 time. (Dkt. No. 43, at 14, 18-20.) Defendant argues Plaintiff
3 could have sought leave to amend his complaint to add the FTCA
4 claim as his claim was now administratively exhausted. (Opp'n at
5 3.) However, Plaintiff failed to do so and thus the claim is now
6 time barred. (Id.)

7 Further, Defendant argues that Plaintiff is not subject to
8 equitable tolling. (Id.) Defendant acknowledges that equitable
9 tolling does apply to the FTCA statute of limitations. (Id. at 4
10 (citing United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1638
11 (2015)).) However, Defendant argues that equitable tolling does
12 not apply in this case because Plaintiff cannot establish he
13 pursued his rights diligently or that extraordinary circumstances
14 occurred here to prevent Plaintiff from timely filing. (Id. at 4-5
15 (citing Menominee Indian Tribe of Wisc. v. United States, 136 S.
16 Ct. 750 (2016)).) The Government argues that lacking legal
17 knowledge or misunderstanding the Magistrate Judge's orders are
18 insufficient reasons to show cause for equitable tolling. (Id.)

19 **C. Plaintiff's Reply**

20 In Reply, Plaintiff asserts that equitable tolling is
21 applicable here and is widely available in FTCA suits under the
22 Supreme Court's decision in Kwai Fun Wong. (Reply, Dkt. No. 80, at
23 4-6.) Plaintiff argues that his facts are similar to the plaintiff
24 in Kwai Fun Wong because that plaintiff also missed the statute of
25 limitations due to multiple procedural filings and a pending
26 motion. (Id. at 6.) Plaintiff argues that the Menominee Indian
27 Tribe case is dissimilar to his case because there is no indication
28 that Plaintiff was anything other than diligent in pursuing his

1 rights. (Id. at 6-8.) Plaintiff argues that he did not make
2 mistakes like the Tribe had (it failed to present its claim based
3 on a legal mistake); instead, Plaintiff had included the FTCA claim
4 and said he intended to preserve it in his opposition to the Motion
5 to Dismiss. (Id. at 6-8; see also Opp'n, Dkt. No. 43, at 19-20.)
6 Most importantly, Plaintiff claims, there is no indication or
7 argument that the Government would be prejudiced by allowing
8 equitable tolling in this instance. (Reply at 8-9.)

9 **D. Court's Analysis**

10 The Court holds that leave to amend should be granted here.
11 The Government has been aware of this case since it was properly
12 served in 2014. Plaintiff complied with the FTCA's administrative
13 exhaustion requirement and had this case pending when that
14 administrative procedure was completed. The Government was a
15 defendant in this case at that time, as indicated in its arguments
16 in the Motion to Dismiss. There is no indication that there would
17 be any prejudice to the United States by allowing Plaintiff leave
18 to amend because the United States has been on notice of this cause
19 of action and had a chance to address the claim in the
20 administrative proceedings.

21 Further, in his Opposition to Defendants' Motion to Dismiss,
22 Plaintiff explicitly asked for leave to amend in order to add the
23 FTCA claim if that was what was needed to preserve it. (Dkt. No.
24 43, at 19-20 ("Kontos would have the Defendants know that had the
25 Court not advised him thusly that he would have vigorously sought
26 to sue the United States in this instant matter **and should this**
27 **court allow him to do so, Kontos would make any amendment or claim**
28 **necessary to do so forthwith.**") (emphasis added).) The Magistrate

1 Judge's Report and Recommendation did not address this point or the
2 United States' part in the case; neither did this Court's Order
3 accepting the findings and recommendations of the Magistrate Judge.
4 During the time that Plaintiff was waiting for the Court's order on
5 these matters, Plaintiff's FTCA statute of limitations expired
6 before he could amend his complaint and allege his exhausted claim.
7 This is similar to the facts in Kwai Fun Wong.

8 Thus, the doctrine of equitable tolling is appropriate in this
9 case. There is no indication that Plaintiff was anything other
10 than diligent in pursuit of this action. These kinds of suits are
11 challenging for all pro se plaintiffs faced with strict procedural
12 requirements and challenging rules of law that control who and how
13 to sue. Here, Plaintiff worked with the Magistrate Judge to
14 perfect his complaint and to respond to the Defendants' Motion to
15 Dismiss. The Government has not shown that Plaintiff failed to
16 assert his claim based on a nonbinding legal decision as was found
17 in the Menominee Indian Tribe case, or made some other negligent
18 legal error. Therefore, to the extent necessary, the Court
19 equitably tolls Plaintiff's FTCA statute of limitations so that
20 Plaintiff can reassert the FTCA cause of action now.

21 Now that Plaintiff has counsel, Plaintiff should be allowed to
22 amend his complaint, particularly as no Scheduling Order has been
23 issued in this case, there has been no undue delay, there is no
24 showing of prejudice to the Government, there is no allegation of
25 bad faith, and amendment would not be futile.

26 **IV. CONCLUSION**

27 Therefore, the Court GRANTS Plaintiff thirty days leave to
28 amend his complaint to a Third Amended Complaint. Plaintiff may

1 reassert his FTCA claim. After the filing of the Complaint, the
2 Court orders the parties to attend settlement proceedings pursuant
3 to the Court's rules.

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5 IT IS SO ORDERED.

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7 Dated: May 17, 2016

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DEAN D. PREGERSON
United States District Judge