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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SEKAYI R. WHITE,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

No. 2:17-cv-1829 CKD P

ORDER

Plaintiff is a California prisoner proceeding pro se. On May 9, 2018, the court screened plaintiff's amended complaint as the court is required to do under 28 U.S.C. § 1915A. The court found that this action may proceed on plaintiff's "Breach of Fiduciary Duties" claim against defendant. Both parties have consented to have all matters in this action before a United States Magistrate Judge. See 28 U.S.C. § 636(c). Defendant's motion to dismiss is before the court.

I. Allegations

In his amended complaint, plaintiff alleges as follows:

1. Plaintiff has been incarcerated since April 1, 2007. On that day, plaintiff had approximately \$60,000 in a savings account and \$5,800 in a checking account with Washington Mutual Bank (WaMu). The accounts were not linked to one another. Therefore, funds could not be transferred by WaMu from the savings account to the checking account to satisfy overdrafts from the checking or overdraft fees.

1 2. In January 2009, plaintiff learned that as of November 2007, he had no money in his
2 checking account. At some point, plaintiff called WaMu and spoke to a branch manager who told
3 plaintiff the problem with his checking account “would take months for her to fix it.”

4 3. After his incarceration, plaintiff was not able to obtain any account statements from
5 WaMu until 2014. At that point, plaintiff learned that his savings account had been depleted as
6 well by a series of unauthorized transfers to plaintiff’s checking account and withdrawals.

7 4. In November 2016, plaintiff sued JP Morgan Chase (JPMC) after learning JPMC had
8 taken over WaMu and after JPMC declined to reimburse plaintiff for funds lost in his checking
9 and savings accounts. In February 2017, and pursuant to proceedings in the Superior Court of
10 Orange County, JPMC informed plaintiff “of WaMu’s failure and [the Federal Deposit Insurance
11 Corporation’s (FDIC)] role as the receiver.” In response, plaintiff filed a claim with the FDIC on
12 April 2, 2017. The FDIC referred plaintiff’s claim to the Office of Comptroller of the Currency
13 (OCC). The OCC denied plaintiff’s claim on July 11, 2017.

14 II. Plaintiff’s Claims

15 Under the heading “Breach of Fiduciary Duties” in his first amended complaint, plaintiff
16 alleges as follows:

17 1. Defendant, via the FDIC, breached a duty owed to plaintiff by failing to provide
18 plaintiff with notice of WaMu’s failure and the FDIC’s receivership so that plaintiff could have
19 made a claim concerning his lost savings and checking account funds in a timely manner.

20 2. Defendant, via the FDIC, breached a fiduciary duty by failing to investigate plaintiff’s
21 claims and passing the matter on to the OCC who also declined to investigate.

22 3. Defendant, via the FDIC, violated plaintiff’s rights under the Due Process Clause of
23 the Fourteenth Amendment by failing to provide plaintiff with the notice required under 12
24 U.S.C. §1821(d)(3)(C).

25 Plaintiff seeks return of \$65,580 with interest.

26 III. Due Process Claim

27 In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S.
28 388 (1971) the Supreme Court found that a plaintiff could bring a suit for damages against a

1 federal official based upon a violation of the Constitution. However, such a suit cannot be
2 brought against the United States or a U.S. agency. F.D.I.C. v. Meyer, 510 U.S. 471, 484-86
3 (1994). While defendant does not seek dismissal of plaintiff's due process claim, the claim will
4 be dismissed sue sponte under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to
5 state a claim upon which relief can be granted. See, e.g., Omar v. Sea-Land Service, Inc., 813
6 F.2d 986, 991 (9th Cir. 1987).

7 III. Legal Standards

8 Defendant seeks dismissal of plaintiff's other two claims under Rule 12(b)(1) of the
9 Federal Rules of Civil Procedure. A motion to dismiss under Rule 12(b)(1) tests the subject
10 matter jurisdiction of the court. Challenges to jurisdiction under Rule 12(b)(1) may be facial (i.e.,
11 on the pleadings) or factual, permitting the court to look beyond the complaint. Savage v.
12 Glendale Union High Sch., 343 F.3d 1036, 1039-40 n. 2 (9th Cir. 2003). Either way, plaintiff has
13 the burden of proving jurisdiction to survive the motion. Tosco Corporation v. Communities for a
14 Better Environment, 236 F.3d 495, 499 (9th Cir. 2001).

15 In a facial challenge, a Rule 12(b)(1) motion will be granted if the complaint on its face
16 fails to allege facts sufficient to establish subject matter jurisdiction. Savage, 343 F.3d at 1039
17 n.2. In a factual challenge, "the district court is not restricted to the face of the pleadings, but may
18 review any evidence, such as affidavits and testimony. . ." McCarthy v. United States, 850 F.2d
19 558, 560 (9th Cir. 1988). See also Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th
20 Cir. 1983) (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion
21 into one for summary judgment).

22 Plaintiff's remaining claims are brought under the Federal Tort Claims Act (FTCA), 28
23 U.S.C.A. § 1346, 2671-2678 & 2680. The United States is the only proper defendant for a claim
24 brought under the FTCA. Lance v. U.S., 70 F.3d 1093, 1095 (9th Cir. 1995). "As sovereign, the
25 United States can be sued only to the extent that it has waived its immunity from suit." O'Toole
26 v. United States, 295 F.3d 1029, 1033 (9th Cir. 2002) (quotations and citation omitted). Under
27 the FTCA, the United States waives immunity with regard to some state law tort claims. 28
28 U.S.C. § 2674.

1 IV. Claim Presentation

2 Defendant argues plaintiff's remaining claims must be dismissed because he failed to
3 present the claims directly to the FDIC as required under 28 U.S.C. § 2675(a). A suit cannot be
4 brought against the United States under the FTCA unless the underlying claim(s) is presented to
5 the appropriate federal agency, and the claim is either denied, or six months have passed without
6 final resolution. Id. This claim presentation requirement is a jurisdictional prerequisite to
7 bringing suit. Gillespie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980).

8 As indicated above, plaintiff alleges in his first amended complaint that after plaintiff
9 learned of the FDIC's role as receiver for WaMu, plaintiff filed a "claim" with the FDIC on April
10 2, 2017. Plaintiff attaches a copy of the completed form he submitted to the FDIC as exhibit 1 to
11 his opposition.¹ On the form, plaintiff essentially repeats the allegations made in this action
12 against WaMu regarding the depletion of funds from his checking and savings accounts. He does
13 not complain about the actions of the FDIC. After review of the form submitted by plaintiff to
14 the FDIC and the arguments of the parties, it has become clear that the claims plaintiff presents in
15 this action are based upon the FDIC's response to the completed form and that any claims arising
16 out of the FDIC's response were not presented to the FDIC as required under 28 U.S.C. §
17 2675(a). This being the case plaintiff's claims arising under the FTCA must be dismissed and the
18 court need not respond to the other arguments presented in defendant's motion to dismiss.

19 In accordance with the above, IT IS HEREBY ORDERED that:

20 1. Plaintiff's claim that defendant, via the FDIC, violated plaintiff's rights under the Due
21 Process Clause of the Fourteenth Amendment by failing to provide plaintiff with the notice

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27 ¹ Since the contents of this document are alleged in plaintiff's first amended complaint and
28 neither party questions its authenticity, the document may be considered as part of defendant's
Rule 12(b)(1) facial challenge. See Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994).

1 required under 12 U.S.C. §1821(d)(3)(C) is dismissed for failure to state a claim upon which
2 relief can granted.

3 2. Defendant's motion to dismiss (ECF No. 21) is granted;

4 3. Plaintiff's claims arising under the Federal Tort Claims Act are dismissed; and

5 4. This case is closed.

6 Dated: January 25, 2019



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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