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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANNY L. MCCOY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. C-12-3821 TEH (PR)

ORDER OF SERVICE

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Plaintiff Danny L. McCoy, a federal prisoner presently incarcerated at the Federal Correctional Institution (FCI) in Lompoc, California, has filed a pro se torts complaint under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346, against the United States of America. Plaintiff alleges that he suffered personal injury as a result of negligence and medical malpractice that occurred when he was incarcerated at the FCI in Dublin, California. By separate order, Plaintiff's application to proceed in forma pauperis (IFP) has been granted.

In this Order, the Court will conduct its initial review

1 of Plaintiff's complaint pursuant to 28 U.S.C. § 1915A.

2 I

3 Federal courts must engage in a preliminary screening of
4 cases in which prisoners seek redress from a governmental entity or
5 officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
6 In its review, the Court must identify any cognizable claims and
7 dismiss any claims that are frivolous, malicious, fail to state a
8 claim upon which relief may be granted, or seek monetary relief from
9 a defendant who is immune from such relief. 28 U.S.C.
10 § 1915A(b)(1), (2).

11 The FTCA provides that district courts have exclusive
12 jurisdiction of civil actions against the United States for money
13 damages "for injury or loss of property, or personal injury or death
14 caused by the negligent or wrongful act or omission of any employee"
15 of the federal government while acting within the scope of his
16 office or employment. 28 U.S.C. § 1346(b); FDIC v. Meyer, 510 U.S.
17 471, 477 (1994). The United States is only liable, however, "if a
18 private person[] would be liable to the claimant in accordance with
19 the law of the place where the act or omission occurred." United
20 States v. Olson, 546 U.S. 43, 44-45 (2005); Ravell v. United States,
21 22 F.3d 960, 961 (9th Cir. 1994). The court determines whether the
22 United States is subject to tort liability by applying the law of
23 the state where the act or omission occurred. Id. Because its
24 source of substantive liability is the law of the state where the
25 act or omission occurred, the FTCA is limited to state torts and
26 does not encompass constitutional torts. Meyer, 510 U.S. at 478.

1 Plaintiff alleges that, on January 27, 2011, when he was
2 incarcerated at the FCI in Dublin, California, he was exercising on
3 the Pull/Dip bar and the entire machine fell on top of him, injuring
4 his left shoulder, lower back and right wrist. Medical staff was
5 busy on the day of the accident. He was seen a few days later by a
6 medical practitioner who prescribed ibuprofen, but who did not order
7 an x-ray of Plaintiff's injured shoulder, back or wrist. Later, it
8 was discovered that Plaintiff's left shoulder was fractured when the
9 machine fell on him and the shoulder healed with bone fragments in
10 his Acromioclavicular (AC) joint. In October 2011, surgery was
11 performed on Plaintiff's left shoulder to remove the bone fragments.
12 Plaintiff indicates that he has been in pain from the day of the
13 incident and that his lower back "is still giving him problems."
14 Plaintiff seeks two million dollars in damages.

15 Plaintiff presented his claim to the Federal Bureau of
16 Prisons (BOP), alleging medical malpractice and negligence based on
17 the fact that the Pull-up bar was not bolted into the ground as it
18 should have been. On May 10, 2012, the BOP denied Plaintiff's
19 claim. On July 20, 2012, Plaintiff filed this federal complaint
20 alleging negligence and medical malpractice.

21 In his federal complaint, Plaintiff does not list his
22 causes of action. The Court construes it as alleging the claims of
23 negligence and medical malpractice that Plaintiff presented to the
24 BOP. In his cover letter accompanying the complaint, Plaintiff
25 states that he would like to add negligence and mental anguish to
26 his claim. Because Plaintiff's claim to the BOP includes

1 negligence, that claim is included in his federal complaint. By
2 referring to mental anguish, Plaintiff may be attempting to state a
3 claim for intentional infliction of emotional distress. However,
4 because this claim was not presented to the BOP, it is barred. See
5 Wilson v. Drake, 87 F.3d 1073, 1076 (9th Cir. 1996) (the
6 presentation of a claim to the appropriate federal agency and the
7 agency's denial of that claim is a jurisdictional prerequisite to
8 bringing suit under the FTCA).

9 II

10 To be cognizable, a claim under the FTCA must be:
11 "(1) against the United States, (2) for money damages . . ., (3) for
12 injury or loss of property, (4) caused by the negligent or wrongful
13 act or omission of any employee of the Government, (5) while acting
14 within the scope of his office or employment, (6) under
15 circumstances where the United States, if a private person, would be
16 liable to the claimant in accordance with the law of the place where
17 the act or omission occurred." Meyer, 510 U.S. at 477.

18 Plaintiff's medical malpractice and negligence allegations
19 meet the first five requirements for stating a claim under the FTCA.
20 To determine if the allegations meet the sixth requirement, the
21 Court looks to California law because Plaintiff's claims are based
22 on acts that occurred in California.

23 Under California law the elements of a medical malpractice
24 claim are: (1) the duty of the medical professional to use such
25 skill, prudence, and diligence as other members of his profession
26 commonly possess and exercise; (2) a breach of that duty; (3) a

1 proximate causal connection between the negligent conduct and the
2 plaintiff's injury; and (4) actual loss or damage resulting from the
3 professional's negligence. Avivi v. Centro Medico Urgente Medical
4 Ctr., 159 Cal. App. 4th 463, 468 n.2 (2008). Under California law,
5 the elements of a negligence claim are: (1) the defendant's duty to
6 use due care; (2) the defendant's breach of that duty; (3) a
7 proximate causal connection between the breach and the resulting
8 injury; and (4) injury resulting from the breach. Vasquez v.
9 Residential Investments, Inc., 118 Cal. App. 4th 269, 278 (2004).

10 Taken liberally, Plaintiff's allegations state cognizable
11 claims for medical malpractice and negligence.

12 III

13 For the foregoing reasons, the Court orders the following:

14 1. The clerk of the court shall issue summons and the
15 United States Marshal shall serve, without prepayment of fees, a
16 copy of the summons and complaint in this matter, all attachments
17 thereto, and copies of this order upon Defendant's counsel, the
18 United States Attorney for the Northern District of California. The
19 clerk shall also send a copy of the summons and of the complaint to
20 the Attorney General of the United States in Washington, D.C. The
21 clerk shall also serve a copy of this order on Plaintiff.

22 2. In order to expedite the resolution of this case, the
23 Court orders as follows:

24 a. No later than sixty-three days from the date of
25 this order, Defendant shall file a motion for summary judgment or
26 other dispositive motion. The motion shall be supported by adequate
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1 factual documentation and shall conform in all respects to Federal
2 Rule of Civil Procedure 56, and shall include as exhibits all
3 records and incident reports stemming from the events at issue. If
4 Defendant is of the opinion that this case cannot be resolved by
5 summary judgment, it shall so inform the Court prior to the date its
6 summary judgment motion is due. All papers filed with the Court
7 shall be promptly served on Plaintiff.

8 b. Plaintiff's opposition to the dispositive motion
9 shall be filed with the Court and served upon Defendant no later
10 than thirty-five days from the date he is served with Defendant's
11 motion. Plaintiff is advised to read Rule 56 of the Federal Rules
12 of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317, 322-
13 23 (1986) (party opposing summary judgment must come forward with
14 evidence showing triable issues of material fact on every essential
15 element of his claim). Plaintiff shall take notice of the following
16 warning: Plaintiff is advised that a motion for summary judgment
17 under Rule 56 of the Federal Rules of Civil Procedure will, if
18 granted, end your case. Rule 56 tells you what you must do in order
19 to oppose a motion for summary judgment. Generally, summary
20 judgment must be granted when there is no genuine issue of material
21 fact - that is, if there is no real dispute about any fact that
22 would affect the result of your case, the party who asked for
23 summary judgment is entitled to judgment as a matter of law, which
24 will end your case. When a party you are suing makes a motion for
25 summary judgment that is properly supported by declarations (or
26 other sworn testimony), you cannot simply rely on what your
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1 complaint says. Instead, you must set out specific facts in
2 declarations, depositions, answers to interrogatories, or
3 authenticated documents, as provided in Rule 56(e), that contradict
4 the facts shown in Defendant's declarations and documents and show
5 that there is a genuine issue of material fact for trial. If you do
6 not submit your own evidence in opposition, summary judgment, if
7 appropriate, may be entered against you. If summary judgment is
8 granted, your case will be dismissed and there will be no trial.
9 Rand v. Rowland, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc).

10 c. If Defendant wishes to file a reply brief, it
11 shall do so no later than twenty-one days after the date it is
12 served with Plaintiff's opposition.

13 d. The motion shall be deemed submitted as of the
14 date the reply brief is due. No hearing will be held on the motion
15 unless the Court so orders at a later date.

16 3. All communications by Plaintiff with the Court must
17 be served on Defendant's counsel once counsel has been designated,
18 by mailing a true copy of the document to Defendant's counsel.

19 4. It is Plaintiff's responsibility to prosecute this
20 case. Plaintiff must keep the Court informed of any change of
21 address and must comply with the Court's orders in a timely fashion.
22 Failure to do so may result in the dismissal of this action for

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1 failure to prosecute pursuant to Federal Rule of Civil Procedure
2 41(b).

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4 IT IS SO ORDERED.

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7 DATED 08/07/2012



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THELTON E. HENDERSON
United States District Judge

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