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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FLORA B. STAMPS,

Case No. 14-01394 RS

Plaintiff,

**ORDER GRANTING MOTION TO
DISMISS**

v.

MERVYN B. NICHOLAS; VETERANS
ADMINISTRATION; DOES 1 THROUGH
100, INCLUSIVE,

Defendants.

_____ /

I. Introduction

Flora Stamps filed suit in Contra Costa Superior Court against Mervyn Nicholas, the Veterans Administration (“VA”), and Does 1 through 100 for wrongful death and related tort claims arising from her husband’s treatment and subsequent death under Nicholas’s care at the Veterans Administration Clinic. The VA is a federal agency of the United States government. In response to the complaint, the U.S. Attorney certified that Nicholas was acting within the scope of his

1 employment at the time the claim arose.¹ On that basis, the government removed the case to federal
2 court and the United States was automatically substituted for the federal defendants. See 28 U.S.C.
3 §§ 1346(b)(1), 1441, 1442.

4 The government now moves to dismiss the complaint for lack of subject matter jurisdiction
5 because plaintiff failed to exhaust the required administrative remedies. Pursuant to Civil Local
6 Rule 7-1(b), the motion is suitable for disposition without oral argument, and the hearing set for July
7 3, 2014 is vacated. The time for plaintiff to respond to the government's motion has passed without
8 any response from plaintiff. Having considered the matter, and good cause appearing, the
9 government's motion is granted for the reasons explained below.

10 II. FACTUAL BACKGROUND

11 As alleged in the complaint, Nicholas was working at the VA hospital in Martinez,
12 California, on January 4, 2011, when he prescribed medication to plaintiff's husband, Donald
13 Stamps. According to the complaint, this particular medication was contraindicated for Donald
14 Stamps, who suffered from renal impairment and was on dialysis. One day later, he began to
15 experience hallucinations and fell into a comma. He died on January 16, 2013. Stamps brought this
16 suit on January 16, 2014, against the VA and Nicholas for negligence, intentional tort, and wrongful
17 death. She seeks general, special, and punitive damages. Defendant removed the matter to federal
18 court on March 26, 2014.

19 III. LEGAL STANDARD

20 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the court's
21 subject matter jurisdiction over the asserted claims. It is the plaintiff's burden to prove jurisdiction
22 at the time the action is commenced. *Tosco Corp. v. Communities for Better Environment*, 236 F.3d
23 495, 499 (9th Cir. 2001); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858

24
25 ¹ 28 U.S.C. § 2675(d) provides that when a plaintiff asserts a tort claim against a defendant who is a
26 federal employee, the Attorney General will certify whether that individual was acting within the
27 scope of his or her employment at the time the claim arose. This duty has been delegated by the
28 Attorney General to the U.S. Attorney. If the defendant employee's conduct is so certified, the law
provides for removal and mandatory substitution of the United States in place of the employee. 28
U.S.C. § 2679(d)(2).

1 F.2d 1376, 1380 (9th Cir. 1988). A court considering a 12(b)(1) motion to dismiss is not limited to
2 the pleadings, *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), but may rely on
3 extrinsic evidence to resolve factual disputes relating to jurisdiction. *St. Clair v. City of Chico*, 880
4 F.2d 199, 201 (9th Cir. 1989). Once a challenge has been raised to the court’s subject matter
5 jurisdiction, the party opposing dismissal must “present affidavits or any other evidence necessary
6 to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.” *St.*
7 *Clair*, 880 F.2d at 201; *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir.
8 2003).

9 IV. DISCUSSION

10 The Federal Tort Claims Act (“FTCA”) is the exclusive remedy for torts committed by
11 Government employees in the scope of their employment. 28 U.S.C. § 2679(b)(1). For tort actions
12 within the purview of 28 U.S.C. 1346(b), including Stamps’ complaint against Nicholas and the VA,
13 the FTCA establishes the terms and conditions on which suit may be instituted. 28 U.S.C.
14 § 2675(a). In particular, the FTCA allows a tort claimant to sue the United States only after the
15 claimant exhausts his or her administrative remedies with the federal agency that is purportedly
16 responsible for the injury. *Id.*; see *Johnson v. United States*, 704 F.2d 1431, 1442 (9th Cir. 1983).
17 The FTCA’s exhaustion requirement goes to the subject matter jurisdiction of the Court. *Vacek v.*
18 *U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006). An action filed prematurely, before the
19 claimant has exhausted his or her administrative remedies, must be dismissed. *McNeil v. United*
20 *States*, 508 U.S. 106, 111–113 (1993).

21 As relevant here, § 2675(a)(1) provides that an action shall not commence unless at least six
22 months have elapsed from the date of presentment of the claim to the agency, if no final denial
23 occurred before that time. According to the government, plaintiff did not present her claim to the
24 VA before filing suit in January 2014. Plaintiff has not presented any evidence to the contrary or
25 otherwise responded to the government’s motion to dismiss. Plaintiff, therefore, has not met her
26 burden to establish subject-matter jurisdiction by demonstrating that she complied with the scheme
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1 for administrative relief set forth in the FTCA before filing suit against the agency. On that basis,
2 her complaint must be dismissed. *See McNeil*, 508 U.S. at 113.

3
4 V. CONCLUSION

5 For the foregoing reasons, defendant's motion to dismiss is granted for lack of subject-
6 matter jurisdiction. The complaint is hereby dismissed with leave to amend. Any amended
7 complaint must be lodged within thirty (30) days of the date of this order.

8 The Case Management Conference scheduled on June 26, 2014 shall be continued to August
9 28, 2014 at 10:00 a.m. in Courtroom 3 on the 17th Floor of the United States Courthouse, 450
10 Golden Gate Avenue, San Francisco. The parties shall file either a Joint Case Management
11 Statement or separate Case Management Statements, as provided in Civil Local Rule 16-9(a), at
12 least one week prior to the Conference. Parties or counsel may appear personally or file a request to
13 appear by telephone. If any party files such a request, all parties shall appear telephonically at 11:00
14 a.m. and must contact Court Conference at 866/582-6878 at least one week prior to the Conference.

15 IT IS SO ORDERED.

16
17 Dated: June 9, 2014



18 RICHARD SEEBORG
19 UNITED STATES DISTRICT JUDGE