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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK G. ANDERSON,)	Civil No. 08cv2306-L(JMA)
)	
Plaintiff,)	ORDER GRANTING WITH
)	PREJUDICE DEFENDANT'S
v.)	MOTION TO DISMISS FOR LACK
)	OF JURISDICTION [doc. #10]
FEDERAL DEPOSIT INSURANCE)	
CORPORATION,)	
)	
Defendant.)	

Defendant FDIC, as the Receiver for Washington Mutual Bank, FA, move to dismiss this action for lack of jurisdiction. The motion has been fully briefed and is considered on the papers submitted without oral argument pursuant to Civil Local Rule 7.1(d)(1).

Procedural Background

Defendant's motion is based on plaintiff's failure to exhaust the statutory claims procedure. Plaintiff argues, however, that he did file a timely claim with the FDIC or alternatively, the FDIC should be equitable estopped from asserting the jurisdictional bar.

Plaintiff filed his action against Washington Mutual in the Superior Court of the State of California for the County of San Diego. After the complaint was filed, Washington Mutual failed as a financial institution and was taken over by the federal government with the FDIC appointed as the Receiver. The FDIC removed the action to this Court.

1 When the FDIC is appointed as Receiver, 12 U.S.C. Section 1821(d)(13)(D) precludes
2 jurisdiction of any court over

3 (i) any claim or action for payment from, or any action seeking a
4 determination of rights with respect to, the assets of any depository
5 institution for which the [FDIC] has been appointed receiver, including
6 assets which the [FDIC] may acquire from itself as such receiver; or
7 (ii) any claim relating to any act or omission of such institution or the
8 [FDIC] as receiver.

9 As result of this statute, Courts lack jurisdiction over a claimant's claim until the claimant
10 exhausts the administrative claims process as stated in 12 U.S.C. Section 1821(d). *Henderson v.*
11 *Bank of New England*, 986 F.2d 319, 320-21 (9th Cir. 1993). However, judicial review is
12 available after the administrative process is completed, as provided in 12 U.S.C. Section
13 1821(d)(6)(a). *McCarthy v. F.D.I.C.*, 348 F.3d 1075, 1078 (9th Cir. 2003).

14 As required by 12 U.S.C. Section 1821(d)(3), the FDIC published notice regarding the
15 filing of claims and set April 22, 2009 as the claims bar date. If a claim is not timely filed, it
16 must be denied. 12 U.S.C. § 1821(d)(5)(C)(i). An untimely claim may be considered by the
17 FDIC if the claimant shows he “did not receive notice of the appointment of the receiver in time
18 to file such claim before [the claim bar date]; and [] such claim is filed in time to permit payment
19 of such claim.” *Id.* § 1821(d)(5)(C)(ii).

20 Discussion

21 As noted, if plaintiff failed to exhaust the mandatory administrative claims process, the
22 Court lacks subject matter jurisdiction of plaintiff's claims. Plaintiff contends, however, that he
23 timely filed an administrative claim sufficient to satisfy the Federal Tort Claims Act (“FTCA”)
24 requirements, the FDIC is bound by its counsel's representations, and the claims requirement is
25 not applicable because the litigation was underway at the time of the appointment of the FDIC as
26 Receiver.

27 1. Was the Claim Timely Submitted?

28 Plaintiff contends that the FDIC's counsel made an affirmative promise to present
plaintiff's claim to the FDIC. But plaintiff also states that he submitted a “claim following the
format requested by the FDIC,” but the claims bar date had already passed. (Opposition at 9.)

1 In his opposition, plaintiff relies on cases brought under the FTCA and not under the
2 applicable statute, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989
3 (“FIRREA”). As the FDIC properly notes, FIRREA expressly states that claims not timely filed
4 “shall be disallowed and such disallowance shall be final. “ 12 U.S.C. § 1821(d)(5)(C)(i).

5 Because plaintiff acknowledges that the claims bar date passed when he ultimately
6 submitted a claim to the FDIC, his claim was not timely submitted.

7 **2. Estoppel to Establish Jurisdiction**

8 Plaintiff contends that he relied to his detriment on the FDIC’s attorney’s assurances that
9 he was presenting the claim to the FDIC for immediate settlement consideration. However, in a
10 letter dated November 14, 2008 to plaintiff’s counsel, the FDIC’s counsel specifically set out the
11 mandatory statutory claims procedure 46 days prior to the claims bar date. In other words,
12 plaintiff’s counsel was given actual written notice of the mandatory statutory procedure.

13 The November 14, 2008 letter specifically confirmed that the FDIC’s counsel would
14 “forward to my contact at the FDIC your request to expedite the evaluation of your client’s
15 claims and the scheduling of a settlement conference” but did not suggest that counsel for the
16 FDIC would present plaintiff’s claim to the FDIC. (*See* Declaration of Howard A. Kipnis.)

17 More importantly, the Ninth Circuit has held that the “doctrines of waiver and estoppel do
18 not apply to subject matter jurisdiction determinations.” *Intercontinental Travel Marketing, Inc.*
19 *v. FDIC*, 45 F.3d 1278, 1286 (9th Cir. 1994). Accordingly, plaintiff cannot rest on estoppel for
20 his failure to timely present his claim to the FDIC.

21 **3. Claims Requirement When Litigation is Pending at the Time the Receiver is** 22 **Appointed**

23 Finally, plaintiff contends that when actions are brought for monetary damages prior to
24 the appointment of a receiver, the Court continues to have subject matter jurisdiction over the
25 case. Plaintiff argues that in order to require the plaintiff in a pre-receivership action, such as
26 himself, to exhaust his administrative remedies before continuing the action, the Receiver must
27 insist on the use of its administrative processes by staying the action and informing the plaintiff
28 that it is doing so the administrative remedies may be exhausted and it must do so within the 90-

1 day period specified in the statute.

2 Ninth Circuit law does not support plaintiff's position. *Intercontinental Travel* expressly
3 held that under FIRREA, a claimant who fails to file a timely administrative claim and exhaust
4 his administrative remedies loses his right to commence or continue judicial proceeds regardless
5 of whether judicial proceedings were commenced prior to or after the appointment of a receiver.

6 **4. Conclusion**

7 Plaintiff was aware of the appointment of the FDIC's appointment as a receiver before the
8 expiration of the statutory claims filing period. The statutory claims procedure was set forth in
9 writing to plaintiff's counsel prior to the expiration of the statutory claims filing period. Because
10 the exhaustion of administrative remedies is a jurisdictional requirement, under Ninth Circuit
11 law, estoppel cannot provide refuge for plaintiff's failure to timely file an administrative claim.
12 For all these reasons, **IT IS ORDERED** dismissing this action with prejudice.

13 **IT IS SO ORDERED.**

14 DATED: March 30, 2010

15 
16 M. James Lorenz
United States District Court Judge

17 COPY TO:

18 HON. JAN M. ADLER
19 UNITED STATES MAGISTRATE JUDGE

20 ALL COUNSEL/PARTIES
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