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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CHRISTINE MARIE PLANTE,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

**CASE NO. 09-CV-01217-H (POR)
ORDER GRANTING MOTION
TO DISMISS**

On June 8, 2009, Defendant United States of America filed a motion to dismiss Plaintiff's first amended complaint based on lack of subject matter jurisdiction. (Doc. No. 5.) Plaintiff filed a "motion for continuance" on June 22, 2009, which the Court construes as a response in opposition to Defendant's motion to dismiss. (Doc. No. 6.) Defendant filed a reply on July 6, 2009. (Doc. No. 7.)

The Court, pursuant to its discretion under Local Rule 7.1(d)(1), determines this matter is appropriate for resolution without oral argument and submits it on the parties' papers. For the reasons set forth below, the Court grants Defendant United States' motion to dismiss.

Background

On December 15, 2008, Plaintiff Christine Marie Plante, proceeding pro se, initiated this medical malpractice action in the Superior Court of California, in and for the County of San Diego, against Defendants Diletta Renier-Berg, M.D., Denise Y. Gomez, M.D., and the Georgetown University School of Dentistry. (Doc. No. 1.) On April 27, 2009, Plaintiff filed

1 an amended complaint naming as the only defendant Denise Y. Gomez, M.D., a physician-
2 employee of the North County Health Project, Inc., doing business as North County Health
3 Services (“NCHP”), a federally supported health center. (Id.) On June 4, 2009, Defendant
4 Denise Gomez removed this action to this Court and the United States filed a motion to
5 substitute party. (Id.; Doc. No. 2.) On June 5, 2009, the Court granted the United States’
6 motion to substitute party, substituting the United States of America in place of Denise Gomez,
7 as NCHP’s employees are deemed by the Secretary of Health and Human Services to be Public
8 Health Service employees for purposes of the Federal Torts Claims Act (“FTCA”), 28 U.S.C.
9 §§ 1346(b), 2671, et seq., and the Attorney General of the United States certified that
10 Plaintiff’s allegations concern actions taken by Denise Gomez while operating within the scope
11 of her employment as an employee of NCHP. (Doc. No. 4.)

12 The United States seeks dismissal of this action for lack of subject matter jurisdiction
13 under the FTCA based on Plaintiff’s failure to file an administrative claim prior to
14 commencing this suit. (Doc. No. 5.) Plaintiff contends that her suit is proper as she has
15 complained to the medical boards in both New Mexico and California. (Doc. No. 6 at 4.)
16 Plaintiff also contends that she misunderstood the amendment process in state court.

17 Discussion

18 **I. Legal Standard Motion to Dismiss for lack of Subject Matter Jurisdiction**

19 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a motion to dismiss for
20 lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction and limits
21 upon federal jurisdiction must not be disregarded or evaded. Owen Equipment & Erection Co.
22 v. Kroger, 437 U.S. 365, 374 (1978). Federal courts have exclusive jurisdiction of civil actions
23 on claims against the United States, for personal injury or death caused by the negligent or
24 wrongful act or omission of any employee of the Government while acting within the scope
25 of his office or employment. 28 U.S.C. §1346(b)(1). The plaintiff has the burden to establish
26 that subject matter jurisdiction is proper. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375,
27 377 (1994). This burden, at the pleading stage, must be met by pleading sufficient allegations
28 to show a proper basis for the court to assert subject matter jurisdiction over the action.

1 McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); FED.R.CIV.P. 8(a)(1).
2 A defense based on the lack of subject matter jurisdiction is never waived, and may be raised
3 by any party at any time. Attorneys Trust v. Videotape Computer Products, Inc., 93 F.3d 593,
4 594–95 (9th Cir. 1996). When a defendant challenges jurisdiction “facially,” all material
5 allegations in the complaint are assumed true, and the question for the court is whether the lack
6 of federal jurisdiction appears from the face of the pleading itself. Thornhill Publishing Co. v.
7 General Telephone Electronics, 594 F.2d 730, 733 (9th Cir.1979). “A plaintiff suing in a
8 federal court must show in his pleading, affirmatively and distinctly, the existence of whatever
9 is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect
10 called to its attention or on discovering the same, must dismiss the case, unless the defect can
11 be corrected by an amendment .” Tosco Corp. v. Cmtys. for a Better Env’t, 236 F.3d 495, 499
12 (9th Cir. 2001).

13 Defendant United States asserts that Plaintiff’s first amended complaint fails to show
14 a proper basis for subject matter jurisdiction because Plaintiff does not allege that she has
15 exhausted her administrative remedies under the FTCA prior to filing her complaint. Under
16 the FTCA, “[a]n action shall not be instituted upon a claim against the United States . . . unless
17 the claimant shall have first presented the claim to the appropriate Federal agency and his
18 claim shall have been finally denied by the agency in writing and sent by certified or registered
19 mail.” 28 U.S.C. § 2675(a). The failure of an agency to make a final disposition of a claim
20 within six months after it is filed is deemed a final denial of the claim. Id. In other words, an
21 FTCA claim may not be brought until the plaintiff has exhausted all administrative remedies.
22 McNeil v. United States, 508 U.S. 106, 113 (1993). Courts strictly construe this requirement
23 because “[s]overeign immunity is an important limitation on the subject matter jurisdiction of
24 federal courts. The United States, as sovereign, can only be sued to the extent it has waived its
25 sovereign immunity.” Vacek v. United States Postal Serv., 447 F.3d 1248, 1250-51 (9th Cir.
26 2006). “[Courts] have repeatedly held that the exhaustion requirement [of the FTCA] is
27 jurisdictional in nature and must be interpreted strictly . . . Any such waiver must be strictly
28 construed in favor of the United States.” Id. Where a plaintiff has prematurely initiated an

1 FTCA claim before exhausting administrative remedies, courts must dismiss the FTCA claim.
2 Jerves v. United States, 966 F.2d 517, 519 (9th Cir. 1992). A premature complaint cannot be
3 cured by presenting an FTCA administrative claim to the agency after suit has been filed.
4 McNeil, 508 U.S. at 110-13. Instead, plaintiffs must initiate a new action for the FTCA claim
5 after exhaustion. See Duplan v. Harper, 188 F.3d 1195, 1199 (10th Cir.1999) (amended
6 complaint filed after exhaustion cannot cure a prematurely filed original complaint).

7 Plaintiff bears the burden of establishing jurisdiction and has failed to do so. See Indus.
8 Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090, 1092 (9th Cir. 1990). From the face of the first
9 amended complaint, federal question jurisdiction under the FTCA is lacking. Plaintiff's first
10 amended complaint makes several allegations against Denise Gomez, M.D., concerning
11 medical treatment Plaintiff received from Dr. Gomez. (Doc. No. 1.) However, Plaintiff does
12 not allege anywhere in her first amended complaint that she has presented her claim to the
13 appropriate Federal agency nor that her claim has been finally denied by the agency in writing
14 or that six months has passed since filing a claim. (See id.) Plaintiff has attached as an exhibit
15 to her opposition a letter from the Medical Board of California concerning a complaint she
16 filed against Dr. Gomez. (Doc. No. 6, Ex. D.) The letter informs Plaintiff that the Medical
17 Board of California had no statutory jurisdiction over the subject matter of Plaintiff's
18 complaint, as Plaintiff apparently complained about Dr. Gomez's demeanor or attitude and Dr.
19 Gomez's billing practice. (Id.) Plaintiff's complaint to a California state agency is not a
20 complaint to the appropriate Federal agency presenting her tort claims against Dr. Gomez.
21 Plaintiff has not alleged, or shown that she can amend her pleadings to allege, exhaustion of
22 administrative remedies under the FTCA to give this Court subject matter jurisdiction over her
23 claims. Furthermore, Defendant indicates by declaration of Meredith Torres, Senior Attorney
24 in the General Law Division, Office of the General Counsel, Department of Health and Human
25 Services, that Plaintiff has not filed an administrative tort claim relating to Dr. Gomez or
26 NCHP with the Department. (Doc. No. 5, Ex. 3, Torres Decl. ¶¶ 1-4.) Accordingly, the Court
27 concludes that Plaintiff's FTCA claim is premature and grants the United States' motion to
28 dismiss Plaintiff's first amended complaint for lack of subject matter jurisdiction.

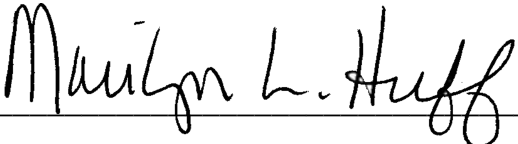
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Conclusion

For the reasons set forth above, the Court GRANTS Defendant United States' motion to dismiss Plaintiff's first amended complaint for lack of subject matter jurisdiction. As the lack of subject matter jurisdiction cannot be cured, the Court orders the case terminated.

IT IS SO ORDERED.

DATED: July 8, 2009



MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT