UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JORGE SALAS, Plaintiff, v. UNITED STATES OF AMERICA, and DOES 1 through 20, Defendants.	Civil No. 12cv0337 JAH(BLM) **ORDER GRANTING PLAINTIFF'S MOTION TO AMEND AND AUGMENT PLAINTIFF'S COMPLAINT [DOC. # 18]**

INTRODUCTION

Currently pending before this Court is the motion to amend and augment the instant complaint filed by plaintiff Jorge Salas ("plaintiff"). The motion has been fully briefed by the parties. After a careful consideration of the pleadings and relevant exhibits submitted, and for the reasons set forth below, this Court GRANTS plaintiff's motion.

BACKGROUND

The instant complaint stems from a traffic accident that occurred on May 18, 2011, in which plaintiff's vehicle collided with Border Patrol Agent Filadelfo Santos' on duty vehicle. Plaintiff sustained multiple injuries to his lower right extremity, requiring surgery. Plaintiff filed a Federal Tort Claims Act ("FTCA") Form 95 on July 13, 2011,[1] three months after the incident, claiming $2,500,000.00 in personal injury damages based on

[1] Defendants claim the operative date for a Form 95 claim is the date the federal agency receives the form, which in this case was July 15, 2011. *See* Doc. # 23 at 3 n. 1. There is no issue regarding timeliness of the filing or presentation of the claim form so this issue will not be addressed.

plaintiff's anticipated full recovery and ability to ambulate on the leg, and on his being able to return to full time work within six months.

Plaintiff did attempt to return to work on a limited basis in 2012 but his recovery did not proceed as well as expected. Plaintiff developed severe chronic pain in the lower leg and complex neuropathy in the foot and ankle along with post-traumatic arthritis and sublar joint and right tibular neuropathy. Further surgery was required. Although the prognosis after this surgery was that plaintiff would be able to ambulate after several months and return to work in early 2013, this did not happen. In Spring 2013, plaintiff was diagnosed with Complex Regional Pain Syndrome and his treating physicians, as well as retained experts from both parties, opined plaintiff needed an amputation of the right lower leg below the knee, which has since taken place.

Plaintiff filed the instant complaint on February 8, 2012. Defendant filed an answer to the complaint on April 17, 2012. On May 31, 2012, plaintiff filed his motion seeking leave to amend his complaint. Opposition to the motion was filed on July 12, 2013 and plaintiff's reply brief was filed on July 22, 2013. The motion was subsequently taken under submission without oral argument. *See* CivLR 7.1(d.1).

DISCUSSION

1. Legal Standard

a. Leave to Amend

The filing of an amended complaint after a responsive pleading has been filed may be allowed by leave of court. Fed.R.Civ.P. 15(a). Rule 15(a) provides in pertinent part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend within 20 days after it is served. Otherwise, a party may amend the party's pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The Supreme Court has instructed lower courts to heed the language of Rule 15(a) to grant leave freely when justice requires. Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). Because Rule 15(a) mandates that leave to amend should be freely given

when justice so requires, the rule is to be interpreted with "extreme liberality." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981).

Granting leave to amend rests in the sound discretion of the trial court. International Ass'n of Machinists & Aerospace Workers v. Republic Airlines, 761 F.2d 1386, 1390 (9th Cir. 1985). This discretion must be guided by the strong federal policy favoring the disposition of cases on the merits. DCD Programs Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). Because Rule 15(a) favors a liberal policy, the nonmoving party bears the burden of demonstrating why leave to amend should not be granted. Genetech, Inc. v. Abbott Laboratories, 127 F.R.D. 529 (N.D. Cal. 1989).

However, even though leave to amend is generally granted freely, it is not granted automatically. *See* Zivkovic v. Southern Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002). Four factors are considered when a court determines whether to allow amendment of a pleading. These are prejudice to the opposing party, undue delay, bad faith, and futility. *See* Forsyth v. Humana, 114 F.3d 1467, 1482 (9th Cir. 1997); DCD Programs, 833 F.2d at 186; *see also* Foman v. Davis, 371 U.S. 178, 182 (1962).

These factors are not equally weighted; the possibility of delay alone, for instance, cannot justify denial of leave to amend. DCD Programs, 833 F.2d at 186; Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). The single most important factor is whether prejudice would result to the nonmovant as a consequence of the amendment. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1053 (9th Cir. 1981). A motion to amend may also be denied if the new cause of action would be futile. *See* Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991). A proposed amendment is futile only if no set of facts can be proved under the amendment that would constitute a valid claim. Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

//

//

//

b. Amendments under the FTCA

The United States, as a sovereign, is immune from suit except to the extent it consents to be sued. *See* United States v. Mitchell, 445 U.S. 535, 538 (1980). The court's jurisdiction is defined by the terms of the sovereign's consent. *See* United States v. Sherwood, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity must be unequivocally expressed. *See* Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982). The party suing the "United States bears the burden of pointing to such an unequivocal waiver of immunity." Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983). The FTCA provides the exclusive remedy for torts committed by employees of the United States acting within the scope of their employment. 28 U.S.C. §§ 1346, 2671-2680. Under the FTCA, a claim for damages filed in federal court may not exceed the amount sought in the underlying adminstrative claim filed with the appropriate federal agency. 28 U.S.C. § 2675(b).

Section 2675(b) states that:

> Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

28 U.S.C. § 2675(b). Thus, under the FTCA, an amendment to the amount of damages may only be granted if newly discovered evidence or intervening facts relating to the amount of the claim is presented. Id. These two exceptions are distinct. Newly discovered evidence concerns evidence existing at the time the claim was filed but was not discoverable then; intervening facts concerns evidence of facts arising after the filing the claim. Lowry v. United States, 958 F.Supp. 704, 710 (D. Mass. 1997). The burden of proof is on plaintiff to demonstrate he meets either of these exceptions. Salcedo-Albanez v. United States, 149 F.Supp.2d 1240, 1243 (S.D.Cal. 2001).

The FTCA does not require plaintiffs to "know[] what the doctors could not tell [them]." Fraysier v. United States, 766 F.2d 478, 481 (11th Cir.1985). "[W]hether the

plaintiff is seeking an increase under the rubric of 'newly discovered evidence' or 'intervening facts,' one of the key issues is foreseeability. If the condition was reasonably foreseeable at the time the claim was filed, an increase will not be allowed. On the other hand, if it was not ... [then] an increase may be allowed." Lowry, 958 F.Supp. at 711. An objective standard is applied in determining whether a plaintiff satisfies one of the two exceptions to the FTCA.. *See* Michels v. United States, 31 F.3d 686, 689 (8th Cir.1994); Richardson v. United States, 841 F.2d 993, 999 (9th Cir.1988) (remanding matter to district court to determine whether injuries were "reasonably foreseeable" at the time plaintiff filed his administrative claim).

2. Analysis

Plaintiff seeks to amend his complaint and augment his FTCA claim form to seek damages in the amount of $10,000,000.00. Plaintiff points out that his condition has significantly deteriorated since the time he filed his FTCA claim in 2011. Doc. # 18 at 11. In fact, plaintiff claims his condition and prognosis now is significantly different than what was known to his healthcare providers and himself when the July 13, 2011 FTCA claim was filed. Id. at 13. Plaintiff further points out his injuries, including amputation, are permanent and were not only unanticipated but were unthinkable at the time he filed his FTCA claim. Id. Thus, plaintiff contends this newly discovered evidence and intervening facts relating to his diagnosis and prognosis supports an increase in the amount of damages sought in his original administrative claim. Id.

In opposition, defendants contend that plaintiff was aware he may ultimately require an amputation at the time he filed his claim in 2011, pointing to the pre-surgery waiver notations in the Sharp Memorial Hospital medical records where plaintiff underwent surgery in May 2011. *See* Doc. # 23 at 8. Specifically, defendants point to plaintiff's consent to surgery following discussions with medical staff about the risks of surgery, including neuropathic pain, chronic pain and nerve damage. Id. (citing Doc. # 23, Exhs. 1, 3). Defendants explain that, because plaintiff was warned of worst case scenarios such as amputation and chronic pain, it was his burden to account for them

when he filed his administrative claim. Id. (citing Low v. United States, 795 F.2d 466, 471 (5th Cir. 1986)).

Defendants assert that any claim for depression or post traumatic stress psychological injuries were reasonably foreseeable given plaintiff's medical records which contain a history of recurrent major depression, dreams and fears regarding the accident, and notations concerning depression, nervousness, anxiety and insomnia. Id. (citing Doc. # 23, Exhs. 3, 5, 6). Defendants contend plaintiff's psychological damages claim was reasonably foreseeable given his past history of recurrent psychological issues. Id. In addition, defendants contend they will be prejudiced if plaintiff is allowed leave to amend, arguing that plaintiff's motion undercuts the administrative claims procedures upon which Congress authorized a very limited waiver of sovereign immunity. Id. at 10.

In reply, plaintiff points out that "[n]owhere, even in the pre-surgery consent disclosure, did any medical provider disclose or state to [plaintiff] that he could possibly have the lower right leg amputated." Doc. # 27 at 4. Plaintiff contends defendants ignore the standard adopted by the Ninth Circuit in determining if there are grounds to allow amendment to FTCA claims which focuses primarily on what the plaintiff was aware of at the time of the filing of the FTC claim. Id. (citing Richardson, 841 F.2d at 999). Plaintiff argues that the diagnosis of changed or new medical conditions after the FTCA claim was filed has been found to be "newly discovered evidence" sufficient to allow the court to grant an increase in the amount stated on the Form 95 claim pursuant to 29 U.S.C. § 2675(b). Id. at 4-5. Plaintiff notes that courts consistently hold plaintiffs are not charged with "'knowing what the doctors could not tell [them].'" Id. at 5 (quoting Fraysier, 766 F.2d at 481). Plaintiff further notes it has been held that injuries which remain permanent "'obviously warrant more damages than temporary ones,' and [thus] have allowed for an increase in the claim amounts" on that basis. Id. (quoting Fraysier, 766 F.2d at 481).

Plaintiff contends that, here, where plaintiff's injuries resulted in a permanent condition that is worse than what plaintiff was aware of at the time of the FTCA claim

filing and where plaintiff has developed a new condition that was not, and could not have been, diagnosed at the time the FTCA claim was filed, meets the criteria for allowing an increase in the amount of damages claimed. Id. at 5-6. Plaintiff also contends that plaintiff's history of medical complications is an intervening fact that fits the FTCA exception allowing plaintiff to increase his claimed amount. *See* id. at 6-10. Lastly, plaintiff points out defendants' own experts have analyzed the claims of plaintiff and their reports, valuation of damages and conclusions all anticipate plaintiff will require amputation. Id. at 10. Thus, plaintiff argues defendants cannot claim they will suffer prejudice if the claim amount is increased. Id.

This Court's review of the record reflects that plaintiff has presented newly discovered evidence and intervening facts sufficient to support his request for an increase in the damages amount for his FTCA claim. This Court is unconvinced, based on the medical record presented here, that a reasonable person would have foreseen the possibility of amputation, given the fact that plaintiff's prognosis after his first surgery was that he was expected to fully recover, be able to ambulate and could return to full time work. Even after he underwent further surgery in 2012, plaintiff's prognosis was good, in that it was anticipated he would be fully ambulatory and able to work after several months. Then, when plaintiff was diagnosed with Complex Regional Pain Syndrome, which culminated in the necessity that his leg be amputated, it was not, in this Court's view, reasonably foreseeable, thereby constituting intervening facts supporting an amendment. This Court also agrees with plaintiff that no prejudice to defendants will result by allowing plaintiff to increase his damages claim. Accordingly, this Court finds plaintiff has met his burden of demonstrating there was newly discovered evidence and intervening facts sufficient to allow an increase in the claimed amount of damages in this case.

//

//

//

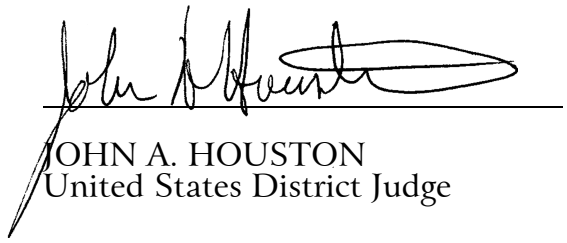
CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to amend and augment his complaint and administrative claim [doc. # 18] is **GRANTED**; and

2. Plaintiff shall file and serve his amended complaint **no later than December 27, 2013**.

Dated: December 2, 2013



JOHN A. HOUSTON
United States District Judge