

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION**

RODNEY RODRIGUEZ SHIPMAN,

Plaintiff,

v.

CASE NO. 5:15-cv-00133-WTH-CJK

UNITED STATES OF AMERICA,
DR. PERRY CATTANU,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

This cause comes on for consideration upon the Magistrate Judge's Order and Report and Recommendation. (ECF No. 125). The parties have been furnished a copy of the Report and Recommendation and have been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). Plaintiff has filed objections at ECF No. 127. I have made a de novo review based on those objections.

Having considered the Report and Recommendation, and the timely filed objections, I have determined that the Report and Recommendation should be adopted. First, the Court agrees with the Magistrate Judge that Dr. Cattau is not an employee of the United States or so controlled or supervised by the United States that his conduct can trigger liability under the Federal Tort Claims Act, 28 U.S.C. § 2671-2680. Summary judgment is thus appropriate on all claims against the United States based on Dr. Cattau's conduct.

Also, the Third Amended Complaint, ECF No. 95, can be construed as containing a deliberate indifference Eighth Amendment claim directly against the United States based on the action of the FCI-Marianna employees. It is well established, however, that no suit may be

brought against the United States unless the United States waives its sovereign immunity and consents to be sued. The United States has not waived sovereign immunity in *Bivens* or similar constitution-based actions. See *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688-89, 69 S.Ct. 1457, 1461, 93 L.Ed.2d 1628 (1949); see also *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir.1982). Therefore, to the extent the third amended complaint is construed to contain such a claim, the claim is due to be dismissed with prejudice.

However, the Court also agrees with the Magistrate Judge that plaintiff has provided sufficient evidence, including expert testimony, to put at issue all of the elements in his medical negligence claim: the professional standard of care, breach of that standard by FCI-Marianna employees, and causation between that breach and plaintiff's suffering, at a minimum, interim damages. Thus, material issues of fact exist, and summary judgment is not appropriate.

Finally, at ECF No. 127, the plaintiff objects to two nondispositive orders of the Magistrate Judge: one denying ECF No. 114, plaintiff's motion to strike the affidavit of Dr. Lopez, and the other denying ECF No. 115, plaintiff's motion to compel production of the contract between Jackson Hospital and the Bureau of Prisons. Under Federal Rule of Civil Procedure 72(a), if a party objects to a Magistrate Judge's order on a nondispositive motion, the District Judge must "modify or set aside any portion of the order that is clearly erroneous or contrary to law." *Id.* After considering the objections, this Court concludes that the Magistrate Judge's rulings are not clearly erroneous or contrary to law.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. The Magistrate Judge's Report and Recommendation, ECF No. 125, is adopted and incorporated by reference in this order.

2. The United States' motion for summary judgment, ECF No. 102, is granted in part and denied in part as follows:
 - a. It is granted in favor of the United States on plaintiff 's claims under the FTCA based upon the conduct of Dr. Cattau..
 - b. The motion for summary judgment is denied in all other respects.
3. To the extent the third amended complaint brings an Eighth Amendment claim directly against the United States, such claim is dismissed with prejudice.
4. The objections to the Magistrate Judge's denials of plaintiff's motion to strike at ECF No. 114 and to compel discovery at ECF No. 115 are overruled.
5. The Clerk shall not enter judgment at this time, and the case is remanded to the Magistrate Judge for further proceedings.

DONE AND ORDERED this 27th day of November, 2017



UNITED STATES DISTRICT JUDGE