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United States District Court,

M.D. Pennsylvania.
Corey ROBINSON, Plaintiff,
v.
UNITED STATES of America, Defendant.
Civil Action No. 3:13–CV–1106.

Signed June 30, 2014.
Corey Robinson, Waymart, PA, pro se.

Justin Blewitt, U.S. Attorney's Office, Scranton, PA, for Defendant.

MEMORANDUM

EDWIN M. KOSIK, District Judge.

***1** Before the court are Plaintiff's Objections (Doc. 33) to the Report and Recommendation of Magistrate Judge Martin C. Carlson dated May 21, 2014 (Doc. 32). For the reasons which follow, we will adopt the Report and Recommendation of the Magistrate Judge.

BACKGROUND

Plaintiff, Corey Robinson, an inmate confined at the United States Penitentiary–Canaan, Waymart, Pennsylvania, filed the instant action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2675, *et. seq.* The basis of the action is a salmonella outbreak at the prison. The Defendant, United States of America, filed a Motion to Dismiss the Complaint (Doc. 21), alleging that Plaintiff failed to exhaust the administrative tort claim process set out in the FTCA. In response, Plaintiff set forth his exhaustion efforts through the prison grievance system (Docs.25–28).

On May 21, 2014, the Magistrate Judge issued a Report and Recommendation (Doc 32), wherein he recommended that the Motion to Dismiss be granted, but without prejudice to the re-filing of a Complaint, if and when Plaintiff completes the process of exhausting his administrative tort claims. Specifically, the Magistrate Judge found that while Plaintiff may have attempted to satisfy the administrative exhaustion requirements through the prison grievance system, he failed to exhaust his tort claim under the process mandated under the FTCA. As the Magistrate Judge points out, as a prerequisite to filing suit under the FTCA, a claim must first be presented to the appropriate federal agency. Moreover, the requirement that the appropriate federal agency act on a claim before suit can be brought is jurisdictional and can't be waived.

In his Objections, plaintiff discusses exhaustion of administrative remedies as it relates to the prison grievance system required under the Prison Litigation Reform Act, 42 U.S.C. § 1997 e(a). Plaintiff also raises the issue of unavailability of administrative remedies.

As discussed by the Magistrate Judge, there is a distinction between the type of administrative exhaustion of inmate grievances required by the Prison Litigation Reform Act ("PLRA") and the administration exhaustion requirement mandated by the FTCA. Further, an inmate may not rely upon the submission of prison grievances to satisfy his separate and independent exhaustion requirement under the FTCA. While Plaintiff asserts that he has filed B.P. forms for the exhaustion of administrative remedies under the prison grievance system, he does not address the Defendant's representation that he has failed to follow the exhaustion requirements of the FTCA.

Because proof of exhaustion of prison grievances does not satisfy the separate administrative exhaustion requirements under the FTCA, we will adopt the Report and Recommendation of the Magistrate Judge. The Defendant's Motion to Dismiss (Doc. 21) will be granted and the Plaintiff's Complaint will be dismissed without prejudice so that he can re-file his Complaint as a new action if and when he fully exhausts his administrative tort claim under the FTCA. An appropriate Order will follow.

ORDER

***2** AND NOW, THIS *30th* DAY OF JUNE, 2014, IT IS HEREBY ORDERED THAT:

(1) The Report and Recommendation of Magistrate Judge Martin C. Carlson filed May 21, 2014 (Doc. 32) is **ADOPTED;**

(2) The Defendant's Motion to Dismiss (Doc. 21) is **GRANTED;**

(3) Plaintiff's Complaint is **DISMISSED without prejudice** to re-file this Complaint if and when Plaintiff fully exhausts his administrative tort claim under the FTCA; and

(4) The Clerk of Court is directed to **CLOSE** this case and to **FORWARD** a copy of this Memorandum and Order to the Magistrate Judge.

REPORT AND RECOMMENDATION

MARTIN C. CARLSON, United States Magistrate Judge.

I. ***Statement of Facts and of the Case***

The *pro se* plaintiff is a federal prisoner, who was formerly housed at the United States Penitentiary–Canaan in the summer of 2011. The plaintiff is currently suing the United States, alleging that in June of 2011 the prison served inmates chicken fajitas. (Doc. 1.) According to the plaintiff, the chicken was bad, and was tainted with salmonella bacteria. (*Id.*) Consequently, the plaintiff contracted food poisoning, and suffered excruciating pain and symptoms which included headaches, diarrhea, abdominal pains, nausea, chills, vomiting, inability to eat and profuse sweating. (*Id.*) Alleging negligence on the part of the prison in the preparation and service of this food, the plaintiff has brought this action seeking damages from the United States, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675, *et seq.*

On December 9, 2013, the defendant filed a motion to dismiss this complaint, which we also construed as a motion for summary judgment. (Doc. 21.) This motion alleged that the plaintiff had failed to exhaust his administrative remedies within the prison before filing this lawsuit, something that prisoner plaintiffs are required by law to do as a prerequisite to seeking relief in federal court. In support of this motion, the defendant submitted a declaration which attested that Robinson never filed an administrative tort claim of the type prescribed by the FTCA, a Form SF 95 or its equivalent. (Doc. 22–1.) For his part, Robinson alleges that he attempted to satisfy this administrative exhaustion requirements, but Robinson describes exhaustion efforts through the prison grievance system, a remedial system which is wholly separate from the type of exhaustion process mandated under the FTCA for tort claims. (Doc. 26.) On these facts, the defendant has now moved to dismiss this complaint, citing the plaintiffs failure to exhaust administrative remedies within the prison system prior to filing this complaint. Such administrative exhaustion is required by law before an inmate may proceed into federal court. The parties have fully briefed this motion, and this motion is, thus, ripe for resolution.

For the reasons set forth below, it is recommended that the motion to dismiss be granted, but without prejudice to the re-filing of a complaint if and when the plaintiff completes the process of exhausting his administrative tort claims.

II. ***Discussion***

A. ***The Parties's Burdens of Proof and Persuasion***

1. ***Motion to Dismiss Rule 12(b)(1)***

***3** The defendant moved to dismiss this FTCA claim for failure to exhaust pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Rule 12(b)(1) permits the dismissal of an action for "lack of subject matter jurisdiction." A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction. *See Mortensen v. First Fed. Sav. and Loan Ass'n,* 549 F.2d 884, 891 (3d Cir.1977). In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff. *See id., PBGC v. White,* 998 F.2d 1192, 1196 (3d Cir.1993). In reviewing a factual attack, the court may consider evidence outside the pleadings. *See Gotha v. United States,* 115 F.3d 176, 178–79 (3d Cir.1997) (citing *Mortensen,* 549 F.2d at 891). *Gould Electronics Inc. v. United States,* 220 F.3d 169, 176 (3d Cir.2000) (footnote omitted) *holding modified on other grounds by Simon v. United States,* 341 F.3d 193 (3d Cir.2003).

Here, the defendant's motion presents a factual attack upon subject matter jurisdiction, arguing that this Court lacks jurisdiction over this claim due to the plaintiff's failure to exhaust his administrative remedies. When presented with such a fact-bound jurisdictional challenge are cautioned that:

> A factual challenge contests the existence of subject matter jurisdiction, apart from any pleadings. *Id.* In reviewing a factual challenge, the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case," even where disputed material facts exist. *Mortensen,* 549 F.2d at 891. In a factual challenge, the plaintiff has the burden of persuasion to show that jurisdiction exists. *Gould,* 220 F.3d at 178; *Mortensen,* 549 F.2d at 891. If the defendant presents evidence contesting any allegations in the pleadings, the presumption of truthfulness does not attach to the plaintiff's allegations and the plaintiff may present facts by affidavit or deposition or in an evidentiary hearing. *Gould,* 220 F.3d at 177; *Mortensen,* 549 F.2d at 891, 893 n. 18. "[I]f there is a dispute of material fact, the court must conduct a plenary trial on the contested facts prior to making a jurisdictional determination." *Gould,* 220 F.3d at 177.

Mover Packing Co. v. United States, 567 F.Supp.2d 737, 748 (E.D.Pa.2008).

2. *Summary Judgment Motion–Rule 56*

Moreover, to the extent that this motion presents matters beyond the pleadings, in the form of competing declarations by the defendant and plaintiff, we have also previously placed the parties on notice that we may treat this motion as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P., Rule 56(a). Through summary adjudication a court is empowered to dispose of those claims that do not present a "genuine issue as to any material fact," Fed.R.Civ.P. 56, and for which a trial would be "an empty and unnecessary formality." *Univac Dental Co. v. Dentsply Int'l, Inc.,* No. 07–0493, 2010 U.S. Dist. LEXIS 31615, at *4 (M.D.Pa. Mar. 31, 2010).

***4** The substantive law identifies which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute about a material fact is genuine only if there is a sufficient evidentiary basis that would allow a reasonable fact finder to return a verdict for the non-moving party. *Id.* at 248–49.

The moving party has the initial burden of identifying evidence that it believes shows an absence of a genuine issue of material fact. *Conoshenti v. Pub. Serv. Elec. & Gas Co.,* 364 F.3d 135, 145–46 (3d Cir.2004). Once the moving party has shown that there is an absence of evidence to support the nonmoving party's claims, "the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." *Berckeley Inv. Group. Ltd. v. Colkitt,* 455 F.3d 195, 201 (3d Cir.2006); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial," summary judgment is appropriate. *Celotex,* 477 U.S. at 322. Summary judgment is also appropriate if the non-moving party provides merely colorable, conclusory, or speculative evidence. *Anderson,* 477 U.S. at 249. There must be more than a scintilla of evidence supporting the nonmoving party and more than some metaphysical doubt as to the material facts. *Id.* at 252; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In making this determination, the court must "consider all evidence in the light most favorable to the party opposing the motion." *A.W. v. Jersey City Pub. Schs .,* 486 F.3d 791, 794 (3d Cir.2007).

Further, a party who seeks to resist a summary judgment motion by citing to disputed material issues of fact must show by competent evidence that such factual disputes exist. In this regard, "only evidence which is admissible at trial may be considered in ruling on a motion for summary judgment." *Countryside Oil Co., Inc. v. Travelers Ins.*

Co., 928 F.Supp. 474, 482 (D.N.J.1995). Similarly, it is well-settled that: "[o]ne cannot create an issue of fact merely by ... denying averments ... without producing any supporting evidence of the denials." *Thimons v. PNC Bank, NA,* 254 F. App'x 896, 899 (3d Cir.2007) (citation omitted). Thus, "[w]hen a motion for summary judgment is made and supported ..., an adverse party may not rest upon mere allegations or denial." *Fireman's Ins. Co. of Newark NJ v. DuFresne,* 676 F.2d 965, 968 (3d Cir.1982), *see Sunshine Books, Ltd. v. Temple Univ.,* 697 F.2d 90, 96 (3d Cir.1982). "[A] mere denial is insufficient to raise a disputed issue of fact, and an unsubstantiated doubt as to the veracity of the opposing affidavit is also not sufficient." *Lockhart v. Hoenstine,* 411 F.2d 455, 458 (3d Cir.1969). Furthermore, "a party resisting a [Rule 56] motion cannot expect to rely merely upon bare assertions, conclusory allegations or suspicions." *Gans v. Mundy,* 762 F.2d 338, 341 (3d Cir.1985) (citing *Ness v. Marshall,* 660 F.2d 517, 519 (3d Cir.1981)).

B. *The FTCA's Administrative Exhaustion Requirement*

***5** In this case it is alleged that the plaintiff did not fully exhaust his administrative remedies before bringing this FTCA action. The plaintiff's alleged failure to exhaust these administrative remedies may have substantive significance for the plaintiff since as a prerequisite to suit under the FTCA, a claim must first be presented to the federal agency and be denied by the agency, or be deemed to be denied. Section 2675(a) of Title 28, United States Code, provides in pertinent part:

> An action shall not be instituted against the United States for money damages for injury or loss of property or personal injury ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of the agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section ....

In general, the United States enjoys sovereign immunity from suit unless it otherwise consents to be sued. *White–Squire v. U.S. Postal Serv.,* 592 F.3d 453, 456 (3d Cir.2010). The United States' "consent to be sued must be 'unequivocally expressed,' and the terms of such consent define the court's subject matter jurisdiction." *Id.* The Federal Tort Claims Act constitutes "a limited waiver of the United States's sovereign immunity." *Id.* The FTCA provides that the United States shall be liable, to the same extent as a private individual, "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment [.]" 28 U.S.C. § 1346(b)(1); *see also* 28 U.S.C. § 2674. Therefore, prior to commencing an FTCA action a plaintiff must comply with the procedural prerequisites set forth by the FTCA. Such procedural compliance is the price plaintiff must pay to take advantage of the limited waiver of sovereign immunity provided by the FTCA.

Thus, prior to commencing an FTCA action against the United States in federal court, a plaintiff must "first present[ ] the claim to the appropriate Federal agency" and receive a final denial "by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). A claim is considered to be presented when the federal agency receives written notification of the alleged tortious incident and the alleged injuries, together with a claim for money damages in a sum certain, in the form prescribed by federal regulations. 28 C.F.R. § 14.2(a). If the receiving federal agency fails to make a final disposition of the claim within six months from the time it is filed, that failure is "deemed a final denial of the claim" for purposes of commencing suit under the FTCA. 28 U.S.C. § 2675(a).

The Third Circuit has instructed us that "[i]n light of the clear, mandatory language of the statute, and [the] strict construction of the limited waiver of sovereign immunity by the United States, ... the requirement that the appropriate federal agency act on a claim before suit can be brought is jurisdictional and cannot be waived." *Roma v. United States,* 344 F.3d 352, 362 (3d Cir.2003) (citing *Livera v. First Nat'l Bank of New Jersey,* 879 F.2d 1186, 1194 (3d Cir.1989)). The Supreme Court has likewise succinctly explained that "[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States,* 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993). As a result, a district court may dismiss a claim

brought under the FTCA for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) where the plaintiff has not exhausted his administrative remedies prior to filing suit. *See, e.g.,* *Abulkhair v. Bush,* 413 F. App'x 502, 506 (3d Cir.2011); *Accolla v. United States Gov't,* 369 F. App'x 408, 409–10 (3d Cir.2010) (finding the district court properly dismissed FTCA claim where the plaintiff filed federal suit prior to exhausting administrative remedies).

***6** In this regard, it must be emphasized that full administrative exhaustion is a jurisdictional prerequisite to filing a lawsuit. Therefore, where an FTCA lawsuit is filed before the exhaustion process is completed, we are compelled to dismiss that action. *Miller v. United States,* 517 F. App'x 62, 63 (3d Cir.2013); *Roma v. United States,* 344 F.3d 352, 362 (3d Cir.2003). In short, given the jurisdictional nature of this exhaustion requirement, when an inmate files an FTCA lawsuit before he receives a final denial of his administrative tort claim, "the District Court [i]s without jurisdiction to rule on the FTCA claim[,] *See McNeil,* 508 U.S. at 111–12, 113 S.Ct. 1980, 124 L.Ed.2d 21 (holding that a court is without jurisdiction to rule on a prematurely filed action even if an agency denies the related administrative claim soon after the federal lawsuit is filed)," *Accolla v. U.S. Gov't,* 369 F. App'x 408, 410 (3d Cir.2010), and the claim must be dismissed.

Moreover, caselaw also recognizes that there is a fundamental distinction between the type of administrative exhaustion of inmate grievances through a prison grievance system that is required by the Prison Litigation Reform Act of 1996 (the "PLRA") 42 U.S.C. § 1997e(a), before bringing a *Bivens* constitutional tort claim against individuals, and the separate administrative exhaustion requirement mandated by the FTCA before inmate may pursue tort claims against the United States. *West v. Shultz,* 1:CV–12–1004, 2014 WL 1668093, *6–9 (M.D.Pa. Apr.24, 2014). Given the existence of these two separate administrative processes, and the very different purposes served by these two parallel processes, an inmate may not rely upon the submission of prison grievances to satisfy his separate and independent exhaustion obligation under the FTCA. As this Court has recently observed:

Because of the mandatory exhaustion procedures under both the PLRA and the FTCA, and the separate purposes of these procedures with respect to the different claims, courts have consistently held that fulfillment of one exhaustion requirement does not satisfy the other. *See Lambert v. United States,* 198 F. App'x 835, 840 (11th Cir.2006); *Brockett v. Parks,* 48 F. App'x 539, 541 (6th Cir.2002). This Court has also made clear that the administrative exhaustion requirements under the PLRA and the FTCA are separate and distinct, and that each must be independently followed in order for an inmate to maintain *Bivens* and negligence claims in the same action. *See Williams v. Bledsoe,* Civ. No. 3:CV–12–1235, 2013 WL 5522848 *19–20 (M.D.Pa. Oct.3, 2013) (Caputo, J.); *Lopez v. Brady,* Civ. No. 4:CV–07–1126, 2008 WL 4415585, at *10 (M.D.Pa.Sept.25, 2008) (McClure, J.)

West v. Shultz, LCV–12–1004, 2014 WL 1668093, *9 (M.D.Pa. Apr.24, 2014). *See, e.g., Williams v. Bledsoe,* 3:CV–12–1235, 2013 WL 5522848 (M.D.Pa. Oct.3, 2013) ("Because of the mandatory exhaustion procedures under both the PLRA and the FTCA, and the separate purposes of these procedures with respect to these different claims, courts have consistently held that fulfillment of one exhaustion requirement does not satisfy the other."); *McKreith v. Endicott,* Civ. A. No. 11–CV–105, 2013 WL 990836, at *4 (E.D.Ky. Mar.12, 2013) ("The fact that the administrative remedies filed by [plaintiff] regarding his tort claim were somewhat related to the allegations in his *Bivens* complaint against [the defendant] does not cure his failure to properly exhaust his administrative remedies."); *Gaughan v. U.S. Bureau of Prisons,* No. 02 C 0740, 2003 WL 1626674, at *2 (N.D.Ill.Mar.25, 2003) ("[A]nalysis of the case law persuades the court that the different administrative processes serve different functions and thus are not interchangeable."); *Owusu v. Federal Bureau of Prisons,* No. 02 Civ.0915, 2003 WL, 68031, at *2 (S.D.N.Y.Jan.7, 2003) ("Here, while the plaintiff did fully exhaust the available administrative remedies for his FTCA claim, he did not do so for his *Bivens* claim under the PLRA. The exhaustion procedures under the two statutes differ, and the fulfillment of one does not constitute satisfaction of the other."); *Hylton v. Federal Bureau of Prisons,* No. CV 00–5747, 2002 WL 720605, at *2 (E.D.N.Y. March 11,

2002) (finding that "it is entirely possible that [plaintiff] exhausted his administrative remedies for purposes of the FTCA without exhausting administrative remedies pursuant to the PLRA for purposes of filing a *Bivens* claim" because the plaintiff had failed to exhaust the BOP's four-step grievance procedure); *cf. Funches v. Reish,* No. 97 Civ. 7611, 1998 WL 695904, at *9 (S.D.N.Y. Oct. 5, 1998) (finding that a prisoner's FTCA claim was exhausted but that his *Bivens* claim was not).

C. *The Plaintiffs Current Complaint Should Be Dismissed as Unexhausted But Without Prejudice to Re-filing This Action*

***7** These legal tenets defining the jurisdictional nature of the FTCA's exhaustion requirement control here and compel dismissal of this complaint since the evidence shows that the defendant has never received a proper administrative tort claim from the plaintiff of the type required by the FTCA. Therefore, Robinson has not yet begun, much less completed, the form of administrative exhaustion mandated under by the FTCA. Moreover, recognizing that the plaintiff bears the burden under the FTCA of showing that he has filed proper administrative claims with the appropriate administrative agency, *Medina v. City of Philadelphia,* 219 Fed. Appx. 172 (3d Cir.2007) ("Plaintiff carries the burden of proof to establish presentment of her claim to HUD"); *Livera v. First National State Bank of New Jersey,* 879 F.2d 1186, 1195 (3d Cir.1989), we find that Robinson has not carried his burden of proof in this particular case. In this regard, Robinson's response to this FTCA exhaustion argument focuses almost exclusively upon his efforts at exhaustion of prison grievances, and does not touch upon the FTCA's separate exhaustion requirement in any persuasive or compelling way. Since "[t]his Court has also made clear that the administrative exhaustion requirements under the PLRA and the FTCA are separate and distinct, and that each must be independently followed," *West v. Shultz,* 1:CV–12–1004, 2014 WL 1668093, *9 (M.D.Pa. Apr.24, 2014), proof of exhaustion of prison grievances simply does not satisfy Robinson's separate administrative exhaustion obligations under the FTCA. Therefore, it is recommended that this complaint be dismissed without prejudice to re-filing this action if, and when the plaintiff can fully satisfy the FTCA's exhaustion requirement.

We recommend this course mindful of the fact that *pro se* plaintiffs often should be afforded an opportunity to amend a complaint before the complaint is dismissed in its entirety, *see Fletcher–Hardee Corp. v. Pote Concrete Contractors,* 482 F.3d 247, 253 (3d Cir.2007), unless granting further leave to amend is not necessary in a case such as this where amendment would be futile or result in undue delay, *Alston v. Parker,* 363 F.3d 229, 235 (3d Cir.2004).

Here, we conclude that this rule applies with particular force and strongly favors dismissal of this complaint without prejudice to the re-filing of this action now that the plaintiff has satisfied the FTCA's exhaustion requirement. In particular we note that it cannot be said that the FTCA's statute of limitations would render this course of action futile. Rather, it is well-settled that: "the FTCA's statute of limitations is not jurisdictional, and thus in appropriate circumstances the equitable tolling doctrine can apply in actions under it. *Hughes v. United States,* 263 F.3d 272, 278 (3d Cir.2001); *see Hedges v. United States,* 404 F.3d 744, 748 (3d Cir.2005) (federal courts apply equitable tolling to wide range of cases against the Government, including FTCA claims)." *Santos ex rel. Beato v. United States,* 559 F.3d 189, 194–95 (3d Cir.2009).

***8** Further, in the related context of inmate litigation under the Prison Litigation Reform Act, (PLRA), which also imposes an administrative exhaustion requirement upon prisoner-plaintiffs, it has been held that equitable tolling of any statute of limitations is appropriate while an inmate exhausts his administrative remedies. This conclusion has been consistently reached by those appellate courts which have addressed this question in precedential opinions. *See e.g., Messa v. Goord,* 652 F.3d 305, 310 (2d Cir.2011); *Brown v. Valoff,* 422 F.3d 926, 942–43 (9th Cir.2005); *Johnson v. Rivera,* 272 F.3d 519, 522 (7th Cir.2001); *Brown v. Morgan,* 209 F.3d 595, 596 (6th Cir.2000). This view has also often been espoused by the United States Court of Appeals for the Third Circuit, albeit in non-precedential opinions, where the court of appeals has held that: "[b]ecause exhaustion of prison administrative remedies is mandatory under the Prison Litigation Reform Act, the statute of limitations applicable to § 1983 actions may be tolled while a prisoner exhausts." *Thompson v. Pitkins,* 514 F. Appx. 88, 90 (3d

Cir.2013); *Paluch v. Sec'y Pa. Dep't of Corr.,* 442 Fed. Appx. 690, 694 (3d Cir.2011) (same). *See e.g., Ballard v. Williams,* 3:10–CV–1456, 2010 WL 7809047 (M.D.Pa. Dec.9, 2010) *report and recommendation adopted,* 3:10–CV–1456, 2011 WL 5089726 (M.D.Pa. Oct.25, 2011); *Ozoroski v. Maue,* No. Civ. A. No. 08–0082, 2009 WL 414272, at *7 (M.D.Pa. Feb.18, 2009); *Carter v. Pa. Dep't of Corrections,* Civ. A. No. 08–0279, 2008 WL 5250433, at *11 (E.D.Pa. Dec.17, 2008) ("[T]he statute of limitations begins to run only when [a] plaintiff has exhausted his administrative remedies under the PLRA."); *Cooper v. Beard,* Civ. A. No. 06–0171, 2006 WL 3208783, at *8 (E.D.Pa. Nov.2, 2006) ("Because an inmate would be placed in a situation where his suit would either be barred from federal court for failure to exhaust administrative remedies under the PLRA, or time-barred because he had pursued those administrative remedies ... the statute of limitations for an inmate's § 1983 claims are tolled while he exhausts his administrative remedies.").

We need not reach these statute of limitations issues at present since we are dismissing this action on other, exhaustion grounds. Suffice it to say that the FTCA's statute of limitations may be equitably tolled, and that any statute of limitations and equitable tolling analysis should await the filing of a new and fully exhausted complaint. Therefore, while we are compelled to dismiss the original complaint as unexhausted, that dismissal should be without prejudice to the re-filing of a complaint by the plaintiff as a new action, if an when the plaintiff completes the administrative agency exhaustion required by the FTCA. Indeed, we note that, in a variety of factual contexts, courts have expressly sanctioned dismissal of FTCA actions as unexhausted without prejudice in order to enable plaintiff's to perfect the exhaustion of their administrative remedies. *See e.g., Wadhwa v. Nicholson,* 367 F. App'x 322, 325 (3d Cir.2010); *McLaurin v. United States,* 392 F.3d 774, 782 (5th Cir.2004); *Konarski v. Brown,* 03–5340, 2004 WL 1249346 (D.C.Cir. June 7, 2004); *Bailey v. United States,* 992 F.2d 1222 (10th Cir.1993). In short, in this setting dismissal of an unexhausted claim without prejudice is the preferred and proper course of action.

III. ***Recommendation***

***9** Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the defendant's Motion to Dismiss (Doc. 21.), for failure to exhaust be GRANTED, and the plaintiff's complaint be dismissed, without prejudice to the re-filing of this complaint as a new action if an when the plaintiff fully exhausts his administrative tort claim under the FTCA. It is further recommended that the issue of the potential bar of the statute of limitations, and equitable tolling of the statute of limitations, be deferred for consideration when, and if, the plaintiff re-files this complaint.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 21st day of May, 2014.

M.D.Pa.,2014.

Robinson v. U.S.
Slip Copy, 2014 WL 2940454 (M.D.Pa.)

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