

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 RANDY CASTILLO,

10 Plaintiff,

11 v.

12 UNITED STATES OF AMERICA,

13 Defendant.

CASE NO. C17-0119-JCC

ORDER

14
15 This matter comes before the Court on Defendant's motion for summary judgment (Dkt.
16 No. 22) and Plaintiff's motion to strike (Dkt. No. 43). Having thoroughly considered the parties'
17 briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS
18 Defendant's motion for summary judgment (Dkt. No. 22) and DENIES Defendant's motion to
19 strike (Dkt. No. 43) for the reasons explained herein.

20 **I. BACKGROUND**

21 On March 10, 2013, Plaintiff Randy Castillo suffered a stroke while incarcerated at the
22 Federal Detention Center (the "FDC") in SeaTac, Washington. (Dkt. No. 1 at 2-3.) Prior to the
23 stroke, Mr. Castillo complained of a headache and dizziness to correctional staff, who initially
24 counseled him to rest and hydrate. (*Id.*) After staff observed that Mr. Castillo was slurring his
25 speech, he was taken to the hospital where he was diagnosed with a left vertebral artery
26 dissection. (Dkt. No. 22 at 8.) Seven days after he was admitted to the hospital, a chart note

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1 indicates that Mr. Castillo was “[a]wake and alert,” and that his speech was “fluent.” (Dkt. No.
2 25-3 at 48.) On April 1, 2013, Mr. Castillo was discharged from the hospital and transferred to
3 Highline Medical Center for rehabilitation. (*Id.*) On June 1, 2013, after two months at Highline,
4 Mr. Castillo was transferred to an assisted living facility called Crestwood. (Dkt. No. 22 at 9.)

5 At Crestwood, Mr. Castillo continued to recover from the stroke and began to live more
6 independently. (*See* Dkt. Nos. 25-3 at 3, 4, 9; 36-2 at 9–10, 12–13.) Although mostly confined to
7 a wheelchair, Mr. Castillo managed his own medications, arranged and attended medical
8 appointments, made healthcare decisions, paid bills, and went shopping. (Dkt. Nos. 36-2 at 12;
9 25-3 at 40–41, 91, 94.) Mr. Castillo did not drive, but would arrange for travel through a public
10 service by calling and scheduling a ride. (Dkt. No. 25-3 at 3.) Mr. Castillo regularly spoke with
11 family and friends on the phone, and would sometimes visit and stay with them overnight. (*See*
12 Dkt. No. 26-2 at 8, 14.) He would regularly go to a casino to meet friends, watch sports, and play
13 blackjack. (Dkt. No. 25-3.) Victor Bernarte, a staff member at Crestwood responsible for
14 assisting Mr. Castillo when needed, confirmed that Mr. Castillo lived independently at
15 Crestwood, managed his healthcare, handled financial obligations, and pursued leisure activities.
16 (*See* Dkt. No. 36-2 at 6–7, 9–10.) Mr. Bernarte also testified that he regularly spoke with Mr.
17 Castillo and never had any difficulty understanding him. (*Id.* at 4–5.)¹

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19 ¹ The United States did not attach the relevant excerpts of Mr. Bernarte’s deposition to its
20 summary judgment motion, and Mr. Castillo therefore moved to strike all references to his
21 testimony. (Dkt. Nos. 31 at 7, 43.) Before filing a reply, the United States provided the
22 deposition excerpts by praecipe. (Dkt. No. 36.) The Court will consider the deposition testimony
23 on summary judgment because the Government complied with Local Civil Rule 7(m) and the
24 Court perceives no prejudice to Mr. Castillo in doing so. (*See* Dkt. No. 31 at 7.) Mr. Castillo
25 could have responded to Mr. Bernarte’s testimony regardless of whether his deposition was
26 attached to the Government’s motion. It is clear from Mr. Castillo’s brief, that his counsel
attended Mr. Bernarte’s deposition and was aware of his testimony. (*See generally* Dkt. No. 31.)
After the briefing was closed, Mr. Castillo filed a notice of intent to strike material from the
Government’s reply brief. (Dkt. No. 42) (citing Local Civil Rule 7(g)). However, Mr. Castillo’s
motion to strike was not timely, because he did not file it within five days of the Government’s
reply. *See* W.D. Wash. Local Civ. R. 7(g). Accordingly, the Court DENIES Mr. Castillo’s
motion to strike. (Dkt. Nos. 31, 43.)

1 Three to four months after his stroke, Mr. Castillo began to consider filing a lawsuit
2 against the United States for the allegedly insufficient medical care he received from FDC staff
3 prior to his stroke. (Dkt. Nos. 1, 25-3 at 38.) Mr. Castillo first discussed the idea with family, and
4 “within a year or so” began calling around to try to find an attorney. (Dkt. No. 25-3 at 39–40.)
5 Every attorney Mr. Castillo spoke with declined to represent him, although some referred him to
6 other attorneys. (*Id.*) Mr. Castillo continued searching for an attorney until, at some point, he
7 stopped to focus on his recovery. (*Id.*) Mr. Castillo testified that he stopped looking for a lawyer
8 because he “wanted to communicate and talk better and be able to walk in the office . . . to
9 actually see and talk to someone.” (*Id.*) He is unsure about how long he searched for an attorney
10 or when he stopped. (*Id.* at 42.) Mr. Castillo further states that “[he] really can’t say when [he]
11 started calling lawyers, and [he] really can’t say how many lawyers [he] called, and [he] really
12 couldn’t say what [he] said to those lawyers about what [he] was trying to do.” (Dkt. No. 34 at
13 2.)

14 On April 14, 2016, Mr. Castillo filed an administrative notice of claim with the Bureau of
15 Prisons. (Dkt. No. 32-1 at 1.) By letter dated August 12, 2016, the Bureau of Prisons denied Mr.
16 Castillo’s complaint because he failed to file a notice of claim within two years of his injury as
17 required by 28 U.S.C. § 2401(b). (Dkt. No. 32-2 at 1.) On January 26, 2017, Mr. Castillo filed
18 this lawsuit. (*See* Dkt. No. 1.) His complaint acknowledges that his claim to the Bureau of
19 Prisons was untimely, and invokes the doctrine of equitable tolling due to his “mental
20 incapacity” within the statute of limitations. (*Id.* at 1–3.) The United States moves for summary
21 judgment, arguing that equitable tolling should not apply. (Dkt. No. 22.)

22 **II. DISCUSSION**

23 **A. Legal Standard**

24 The Court will grant a motion for summary judgment when the moving party
25 demonstrates that there are no genuine issues of material fact, and that they are entitled to
26 judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party need not dispel all doubt as

1 to all facts—rather, they must only demonstrate that there are “no *genuine* issue[s] of *material*
2 fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is one that
3 affects the outcome of the case. *Id.* A dispute of fact is genuine if there is sufficient evidence for
4 a reasonable juror to find for the non-moving party. *Id.* The Court must credit the non-moving
5 party’s evidence and draw justifiable inferences in their favor. *Id.* at 255. But if the non-moving
6 party’s assertions are “blatantly contradicted by the record,” the Court need not adopt that
7 version of events for purposes of ruling on the motion. *Scott v. Harris*, 127 U.S. 372, 380 (2007).
8 Assertions in conclusory, self-serving affidavits are insufficient, standing alone, to create a
9 genuine issue of material fact. *Nilsson v. City of Mesa*, 503 F.3d 947, 952 n.2 (9th Cir. 2007).
10 “Missing facts” in the record will not be presumed. *Lujan v. Nat’l Wildlife Found.*, 497 U.S. 871,
11 888–89 (1990).

12 **B. The Federal Tort Claims Act**

13 The United States has partially waived sovereign immunity for tort claims brought by
14 those injured by its employees. Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1). A
15 claim under the FTCA “shall be forever barred unless it is presented in writing to the appropriate
16 federal agency within two years after such claim accrues.” 28 U.S.C. § 2401(b). A medical
17 malpractice claim accrues when a plaintiff becomes aware of both an injury and the injury’s
18 cause. *Hensley v. United States*, 531 F.3d 1052, 1056 (9th Cir. 2008). The claim accrues
19 regardless of whether the plaintiff understands that they have a legal right to seek redress for that
20 injury. *United States v. Kubrick*, 444 U.S. 111, 122 (1979).

21 Thus, Mr. Castillo’s claim against the United States accrued when he first learned that he
22 had suffered a stroke, regardless of when he first considered legal action. Mr. Castillo admitted
23 that when he was discharged from the hospital on April 1, 2013, he knew he had suffered a
24 stroke and was injured as a result. (Dkt. No. 25-5 at 3.) Mr. Castillo had two years from that
25 date—until April 1, 2015—to file the necessary notice of claim to preserve his legal right to
26 bring a tort action against the United States. 28 U.S.C. § 2401(b). It is undisputed that he failed

1 to do so. (Dkt. Nos. 22 at 13, 31 at 6.) The Bureau of Prisons received Mr. Castillo’s notice of
2 claim on April 14, 2016—more than a year past the deadline. (Dkt. No. 32-1 at 1.) Therefore,
3 unless Mr. Castillo can show that the statute of limitations should be tolled, his claim is time-
4 barred. 28 U.S.C. § 2401(b).²

5 **C. Equitable Tolling**

6 The doctrine of equitable tolling may save a time-barred FTCA claim where
7 extraordinary circumstances prevented the plaintiff from filing in a timely manner. *United States*
8 *v. Wong*, 135 S. Ct. 1625, 1633 (2015). Federal courts apply the doctrine of equitable tolling
9 “sparingly.” *Irwin v. Dep’t of Veterans Affairs*, 490 U.S. 89, 96 (1990). A plaintiff who seeks
10 relief under the doctrine of equitable tolling bears the burden of establishing two things: first,
11 that he was “pursuing his rights diligently,” and second, that an “extraordinary circumstance”
12 prevented him from filing within the statute of limitations. *Holland v. Florida*, 560 U.S. 631, 649
13 (2010). The “diligence prong” relates to those factors within the plaintiff’s control, and equitable
14 tolling is not appropriate when “the litigant was responsible for its *own* delay.” *Menominee*
15 *Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). The “extraordinary
16 circumstances prong,” by contrast, relates to those factors outside the litigant’s control. *Id.* A
17 plaintiff must prove both elements to demonstrate that equitable tolling is warranted. *Id.*

18 **1. Mr. Castillo’s Diligence**

19 The undisputed facts show that Mr. Castillo was not diligent in preserving his legal
20 rights. The Court initially notes that Mr. Castillo appears to conflate diligence in preserving his
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22 ² The same statute provides that all other “civil actions” against the United States must be filed
23 within six years of accrual, unless the plaintiff is legally disabled at the time, in which case the
24 relevant period is three years from when the disability ends. 28 U.S.C. § 2401(a). That provision
25 does not apply to tort actions. *United States v. Glenn*, 231 F.2d 884, 887 (9th Cir. 1956). Mr.
26 Castillo argues that he was legally disabled by his stroke, and that the Court should apply section
2401(a)’s “disability exclusion.” (Dkt. No. 31 at 7.) Since Mr. Castillo is pursuing a tort action
against the United States, his request that the Court apply section 2401(a) is without merit.
Glenn, 231 F.2d at 887.

1 right to pursue legal action with diligence in securing the assistance of counsel. However, *pro se*
2 status, by itself, does not warrant equitable tolling. *See Johnson v. United States*, 544 U.S. 295,
3 311 (2005) (“[W]e have never accepted *pro se* representation alone or procedural ignorance as an
4 excuse for prolonged inattention when a statute’s clear policy calls for promptness.”). Because
5 the lack of an attorney is not alone grounds for equitable tolling, Mr. Castillo’s search for an
6 attorney, by itself, does not satisfy the diligence prong of the equitable tolling test. Even if
7 searching for an attorney was sufficient for the Court to find that Mr. Castillo was diligent, it is
8 undisputed that Mr. Castillo stopped his search for a lawyer within the statute of limitations. (*See*
9 Dkt. No. 25-3 at 40, 43.) Mr. Castillo testified that he called several attorneys until at some point
10 he stopped to focus on his recovery and “lost track of time.” (Dkt. No. 25-3 at 40.)

11 While Mr. Castillo’s efforts to obtain representation may be evidence of diligence, he
12 fails to offer any other evidence that he took action to preserve his legal rights. (*See* Dkt. No. 34
13 at 3.) In fact, Mr. Castillo’s own testimony establishes that searching for an attorney is the *only*
14 step he took toward bringing legal action. (*Id.*) In his declaration, Mr. Castillo acknowledges that
15 before hiring his current attorney, “[he] didn’t even know [he] had to file a claim, or what [he]
16 could claim, and [he] certainly didn’t know what statutes of limitations applied to [his] case.”
17 (*Id.*) Mr. Castillo asserts that until he retained counsel, he was ignorant of the FTCA’s notice of
18 claim requirements. But procedural ignorance does not warrant equitable tolling. *Johnson*, 544
19 U.S. at 311.

20 Mr. Castillo’s assertion that his stroke prevented him from acting diligently is similarly
21 unsupported by the record evidence. A plaintiff’s mental incapacity may be grounds for equitable
22 tolling where the plaintiff establishes a causal link between the incapacity and his inability to
23 comply with the statute of limitations. *See Lawrence v. Florida*, 421 F.3d 1221, 1226–27 (11th
24 Cir. 2005). The plaintiff bears the burden of providing a factual basis for that claim, and the
25 Court will not presume facts that are absent from the record. *Id.* at 1227; *Lujan*, 497 U.S. at 888–
26 89. Aside from generally stating that his stroke affected his mental capacity, Mr. Castillo has not

1 pointed to evidence that creates a factual link between his mental incapacity and his inability to
2 file in a timely manner. (Dkt. No. 31 at 12.) Nor does Mr. Castillo’s expert witness’s general
3 assertion about the cognitive effects of a stroke create a factual link between Mr. Castillo’s
4 stroke and his claimed incapacity. (Dkt. No. 33-1 at 12–13.)

5 In fact, the undisputed evidence suggests that Mr. Castillo had the cognitive capacity to
6 preserve his claim. The record establishes that within five months of his stroke, Mr. Castillo was
7 living independently and pursuing other activities and responsibilities. (*See* Dkt. No. 25-3 at 26–
8 27, 40–41, 31.) Mr. Bernarte, who regularly interacted with Mr. Castillo and was responsible for
9 assisting him when necessary, testified that Mr. Castillo was largely self-reliant, lived an active
10 life, and communicated without issue. (Dkt. No. 36-2 at 4, 7–10.)

11 Mr. Castillo asserts in a declaration that his ability to pursue other activities is not
12 indicative of his ability to have diligently sought counsel or file a notice of claim. However, that
13 conclusory and self-serving statement is not enough to create a genuine dispute of material fact.
14 *See Nilsson*, 503 F.3d at 952. It is also contradicted by evidence exhibiting Mr. Castillo’s ability
15 to pursue other cognitively demanding life activities—such as playing blackjack or managing his
16 finances. (Dkt. No. 34 at 2–3.) Most importantly, while Mr. Castillo was living at Crestwood, he
17 briefly *did* work to bring his claim by attempting to find an attorney, but stopped of his own
18 volition. (Dkt. No. 25-3 at 42.) And during that period, he was unable to retain counsel not
19 because of his mental incapacity, but because the attorneys he contacted declined to represent
20 him. (*Id.* at 40.) Mr. Castillo’s brother submitted a declaration attesting that Mr. Castillo was
21 prevented from retaining counsel because his speech was impaired by the stroke. (Dkt. No. 35 at
22 2.) However, given Mr. Castillo’s testimony that he voluntarily stopped searching for a lawyer,
23 his brother’s contradictory testimony alone cannot create a genuine dispute of material fact. (Dkt.
24 No. 25-3 at 40.)

25 In sum, the Court finds that there are no genuine issues of material fact regarding Mr.
26 Castillo’s diligence in preserving his legal rights. Because Mr. Castillo was substantially

1 responsible for his untimely claim, he has failed to demonstrate the requisite diligence to warrant
2 the extraordinary remedy of equitable tolling. *Menominee Indian Tribe of Wis.*, 136 S. Ct. at 756.

3 2. Extraordinary Circumstances

4 Mr. Castillo has likewise failed to demonstrate that his stroke was a sufficiently
5 extraordinary circumstance to warrant equitable tolling. *Id.* The record clearly establishes that
6 Mr. Castillo engaged in other activities and lived independently within a few months of his
7 stroke. (*See, e.g.*, Dkt. No. 25-3 at 40–41.) Other than the self-serving assertions in his
8 declaration, Mr. Castillo fails to explain why he was capable of managing his healthcare and
9 finances, arranging transportation, shopping for food and clothing, and playing blackjack at a
10 casino, all while laboring under a mental incapacity sufficient to render him incapable of filing
11 the required notice of claim within the statute of limitations. (*See* Dkt. No. 25-3 at 23, 26–27, 29,
12 40–41, 94.) Just as Mr. Castillo has not demonstrated that his stroke prevented him from being
13 diligent, he has failed to show how it was a sufficiently extraordinary circumstance to warrant
14 equitable tolling.

15 Mr. Castillo also asserts that he still suffers from the same physical and mental handicaps
16 that prevented him from filing the required notice of claim within the statute of limitations. (Dkt.
17 No. 31 at 1–2.) Mr. Castillo’s brother and expert witness likewise assert that Mr. Castillo “is still
18 . . . disabled physically and mentally.” (Dkt. Nos. 35 at 2, 331-1 at 13.) But as the United States
19 observes in its reply, Mr. Castillo eventually retained an attorney, filed a notice of claim, and
20 brought this lawsuit. (Dkt. No. 37 at 11.) Mr. Castillo does not explain why, if his cognitive
21 deficits prevented him from filing a timely notice of claim, they did not also prevent him from
22 filing after the statute of limitations expired, or from retaining his present attorney. Even
23 crediting Mr. Castillo’s testimony that his stroke adversely affected his mental and physical
24 capabilities, and continues to do so, the Court finds that Mr. Castillo has failed to put forth
25 sufficient evidence to establish that the stroke’s effects were sufficiently debilitating to prevent
26 him from filing the required notice of claim within the statute of limitations.

