UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Lin Li Qu (a/k/a Michelle Ng) inidivdually as as Administratrix of the Estate of Hiu Lui Ng (a/k/a Jason Ng), and as guardian and next-of-friend of their minor children, Raymond Ng and Johnny Ng Plaintiff,	)	
v.	)	CA-09-CV-0053-S-DLM
Central Falls Detention Facility Corporation et al. Defendants.	)	

DEFENDANT UNITED STATES' MEMORADNUM OF LAW
IN SUPPORT OF MOTION TO DISMISS

NOW COMES the United States of America, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), and hereby files this memorandum of law in support of its motion to dismiss the claims alleged in the Second Amended Complaint against the United States.

BACKGROUND

This action was brought by the wife of Hiu Lui Ng, a former civil immigration detainee, for conduct that allegedly occurred while he was in the custody of the Immigration and Customs Enforcement ("ICE"). During the period of time that Mr. Ng was in ICE custody, he was held at the Donald W. Wyatt Detention Facility in Central Falls in Rhode Island ("Wyatt"), the Franklin County House of Corrections in Greenfield, Massachusetts, and the Franklin County Jail in St. Albans, Vermont, pursuant to contracts between ICE and the three local facilities. Mr. Ng died of cancer on August 6, 2008. The Second Amended Complaint contains allegations against the United States in Counts 15 and 16 under the Federal Torts Claim Act for negligence.

ARGUMENT

As sovereign, the United States is immune from suit except as it consents to be sued. United States v. Mitchell, 463 U.S. 206, 212 (1983); Lehman v. Nakshian, 453 U.S. 156, 160-61 1981); United States v. Testan, 424 U.S. 392, 399 (1976). When it consents to suit, the terms of that consent define the court's jurisdiction to entertain the suit. United States v. Sherwood, 312 U.S. 584, 586 (1941); Santiago-Ramirez v. Sec'y of Dept. of Defense, 984 F.2d 16, 18 (1st Cir. 1993). Those terms must be strictly construed. Deakyne v. Department of Army Corps of Engineers, 701 F.2d 271, 274 n.4 (3rd Cir. 1983). The Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2401, 2471-2680 (FTCA), grants jurisdiction for certain tort claims but is a limited waiver of sovereign immunity. United States v. Kubrick, 444 U.S. 111, 117-18 (1979).

I. THE UNITED STATES IS NOT LIABLE FOR THE ACTS OF WYATT, FRANKLIN HOUSE OF CORRECTIONS, AND THE FRANKLIN COUNTY JAIL BECAUSE THEY ARE CONTRACTORS.

The FTCA contains several exceptions. Where one of those exceptions applies, the United States retains its sovereign immunity and a court lacks subject matter jurisdiction. Wood v. United States, 290 F.3d 29, 35-36 (1st Cir. 2002). A court's power to act depends on its having subject matter jurisdiction. The concept is so fundamental that a court must always be assured it has subject matter jurisdiction, and a defect may be raised at any time. See Bradley v. American Postal Workers Union, 962 F.2d 800, 802 n.3 (8th Cir. 1992)(federal courts cannot ignore their lack of subject matter jurisdiction); Thomas v. Basham, 931 F.2d 521, 523 (8th Cir. 1991)(federal courts have a special obligation to ensure that they have subject matter jurisdiction and must raise the issue sua sponte even where the parties do not).

The party that invokes a court's jurisdiction bears the burden of establishing it. Gibbs. v. Buck, 307 U.S. 66, 72 (1939); Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995). That

burden varies depending upon the stage at which, and the manner in which, jurisdiction is challenged. The response must be proportionate to the attack. Where a defendant makes a factual attack on the existence of subject matter jurisdiction, the court may weigh and decide facts without converting the motion into one for summary judgment, and must do so to the extent necessary to satisfy itself that it has jurisdiction. See Williams, 50 F.3d at 304-5 (court may consider evidence beyond pleadings); Hasse v. Sessions, 835 F.2d 902, 906-8 (D.C. Cir. 1987)(same); Rogers v. Stratton Industries, Inc., 798 F.2d 913, 915 (6th Cir. 1986)(same); Mortensen v. First Federal Savings and Loan Assn., 549 F.2d 884, 891 (3rd Cir. 1977)("no presumption of truthfulness attaches to plaintiff's allegations").

Plaintiff has not and cannot sustain her burden of showing that the alleged tortfeasor in this case was an employee of the United States acting within the scope of his official duties at the time of the alleged tortious conduct. To the contrary, the evidence demonstrates that Wyatt, Franklin House of Corrections and the Franklin County Jail, and their employees were acting as contractors throughout the time that Mr. Ng was incarcerated. The Court lacks subject matter jurisdiction over Plaintiff's claims against the United States as a result.

A. The Independent Contractor Defense.

The FTCA's waiver of sovereign immunity is limited to tort actions against the United States for injuries "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)(emphasis added); Larsen v. Empresas El YunQue, Inc., 812 F.2d 14, 16 (1st Cir. 1986)(holding that the contractor exception is so clearly established that plaintiff's appeal was frivolous). The Act defines "employee of the government" to include "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity,

temporarily or permanently in the service of the United States, whether with or without compensation," and "federal agency" to include "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States," 28 U.S.C. § 2671 (emphasis added). See also United States v. Orleans, 425 U.S. 807, 813-14 (1976).

Whether a person is an employee of the federal government for purposes of the FTCA is a question of federal law. Logue v. United States, 412 U.S. 521, 528 (1973); Ezekiel v. Michel, 66 F.3d 894, 899 (7th Cir. 1995); Brooks v. A.R. & S. Enterprises, Inc., 622 F.2d 8, 10 and n. 5 (1st Cir. 1980). The federal government's ability to control the "detailed physical performance of the contractor" is the critical element in distinguishing an agency from a contractor. Larsen, 812 F.2d at 15 (quoting Orleans, 425 U.S. at 814). "Contracts typically define the parameters of the contracting parties' responsibilities . . . . The critical question is . . . whether the United States directs the manner in which the contractor carries out its obligations under the contract." Brooks, 622 F.2d at 11. See Wood, 290 F.3d at 36 n. 4 ("We find no evidence in the record to support [plaintiff/appellant's] contention" "that the Navy retained close supervisory control over [its contractor's] work.").

B. Wyatt, Franklin House of Corrections and the Franklin County Sherriff were Contractors.

Here, the United States cannot be held liable for the actions of employees of Wyatt, Franklin House of Corrections and the Franklin County Jail (collectively referred to as the "Contract Jails") because all three were contractors, and thus, are not covered by the limited waiver of sovereign immunity provided in the FTCA. See Logue, 412 U.S. at 527-28 (employees of county jail that was contractor of federal government, not federal employees

under the meaning of FTCA). Courts have consistently held that county and state jails contracted by the federal government to house federal prisoners are "contractors" under the meaning of the FTCA, 28 U.S.C. § 2671, and thus, the federal government is not liable for their torts. See e.g., Logue, 412 U.S. at 531; Cannon v. United States , 645 F.2d 1128, 1133-40 (D.C.Cir. 1981). Logue was a wrongful death action brought by the parents of a federal prisoner who had committed suicide while confined in a county jail. 412 U.S. at 529-30. The Supreme Court held that the United States was not liable for the acts of the contract county jail's employees, noting that the contract between the county jail and the United States did not give the United States authority to physically supervise the conduct of the jail's employees. Id.

Likewise, the allegations in Count 15, paragraph 229 (e)-(j) and Count 16 against the United States relate to the conduct of the employees of the Contract Jails, over whom the United States did not have supervisory authority. The Plaintiff admits in the Complaint that the Contract Jails had a contractual relationship with the United States. See Complaint ¶¶ 2, 22, 25, 52. The Plaintiff further alleges that the day-to-day administrative and supervisory duties were the responsibilities of their respective employees. See Complaint ¶¶ 15, 28, 29, 30. Those allegations are consistent with the actual contracts between the United States and the Contract Jails, which reflect that that the United States contracted with all three facilities to house ICE detainees, see Declaration of Jerald H. Neveleff, attached hereto as Ex. A[1], but had no authority to supervise the conduct of the Contract Jail employees. Retention by the United States of the right to inspect the contractors' facilities or any requirement that the contractors comply with federal regulations do not make the United States liable for the acts of its contractors. See Orleans, 425 U.S. at 815; Logue, 412 U.S. at 529-530; Larsen, 812 F.2d at 15; Brooks, 622 F.2d at 12; Miller v. Alpin, 949 F.Supp. 961, 966 (D.R.I. 1997).

[1] The contracts are attached to Mr. Neveleff's declaration.

Moreover, Count 15, paragraph 229 (e)-(j), read in conjunction with paragraphs 57, 59, 62, 67-71, 73-85, 88-93, 95-99, reflects that all allegations of tortious conduct are directed at conduct of employees of the Contract Jails and not employees of the United States. Accordingly, the Court should dismiss those paragraphs of the Complaint pursuant to 12(b)(1) because the Plaintiff has not established subject matter jurisdiction over the United States for that conduct.[2]

Count 16 should be dismissed because it does not contain any specific allegations which would establish subject matter jurisdiction over the United States, but rather merely states a conclusion of law (i.e. that the United States "exercised substantial supervision over the day-to-day activities of Wyatt, Franklin County Jail and Franklin County House of Corrections") without more. Complaint ¶ 234. Not only is that allegation inconsistent with the specific allegations that the day-to-day administrative and supervisory duties were the responsibilities of the Contract Jails' own employees, see Complaint ¶¶ 15, 28, 29, 30, but it is not supported by any other allegation in the Complaint or the terms of the contracts.

II. THE ALLEGATIONS IN COUNTS 15, PARGARPH 229(a)-(d) AND 16 SHOULD BE DISMISSED BECAUSE THEY WERE NOT PART OF THE ADMINISTRATIVE CLAIM

The allegations in Count 15 paragraph 229(a)-(d) and Count 16 of the Complaint should be dismissed pursuant to Fed.R.Civ. P 12(b)(1) because they were not included in the administrative claim. To meet the FTCA jurisdictional requirements, a plaintiff must file a written administrative claim seeking relief from the agency responsible for the injury. 28 U.S.C. § 2675(a). The administrative claim must sufficiently describe the injury to enable the agency

[2] Paragraph 229(g)-(j) relates to Wyatt's provision of medical care to Mr. Ng. The only allegations in the Complaint relating to ICE and Mr. Ng's medical care are contained in paragraphs 63-65 and 72. Paragraphs 63-65 reflect that ICE responded to Mr. Ng's attorney's request for Mr. Ng to be transported to a facility that had medical services. Paragraph 72 alleges that Mr. Ng's attorney wrote to ICE's Boston Field Office Director Bruce Chadbourne requesting medical emergency treatment. The Complaint does NOT allege that ICE failed to respond to that request.

to investigate. Id. This requirement is jurisdictional. GAF Corp. v. United States, 818 F.2d 901, 904 (D.C. Cir. 1987).

Plaintiff filed an administrative claim (the "Administrative Claim") in January, 2009. A copy of that claim is attached hereto as Exhibit B. Plaintiff's administrative claim is for personal injury and wrongful death. Id. The facts submitted in support of that claim relate to the provision of medical care and the physical treatment of Mr. Ng by Wyatt employees. Id.

A. Count 15, paragraph 229(a)-(c)

In Count 15, paragraph 229 (a)-(c), Plaintiff alleges that the United States failed to properly serve Mr. Ng notice prior to issuing a deportation order, illegally detained Mr. Ng without proper notice and due process, and failed to conduct a 120-day custody review. The Administrative claim makes absolutely no reference to due process violations or the so-called "120 day custody review." While the introductory paragraph of the Administrative Claim states that Mr. Ng "did not have notice of his immigration hearing," the actual legal claim – for personal injury and wrongful death – is unrelated to any alleged notice failure. Since those allegations were not part of the Administrative Claim, they should be dismissed. See Moreno v. United States, 2009 WL 2424644 (M.D.Pa. August 5, 2009); Edmonds v. United States, 436 F.Supp.2d 28, 33-34 (D.D.C. 2006); Murphy v. United States, 121 F.Supp.2d 21, 27 (D.D.C. 2000), aff'd, 64 Fed.Appx. 250 (D.C.Cir. 2003); Bembenista v. United States, 866 F.2d 493, 499 (D.D.C. 1989).

B. Count 15, paragraph 229(d)

In Count 15, paragraph 229(d), the Plaintiff alleges that the United States should be liable under the FTCA for "Ordering Mr. Ng to be transported to Hartford, Connecticut from Wyatt despite his physical condition on July 30, 2008." That allegation does not appear in the

Administrative Complaint and is unrelated to any claim for personal injury or wrongful death. The Administrative Complaint states that Wyatt guards mistreated Mr. Ng in the manner in which he was taken to the transport van and that he was pressured by an immigration officer in Hartford. It says nothing about the decision to seek Mr. Ng's presence in Hartford. Since that allegation is outside the scope of the Administrative Claim, it should also be dismissed. Id.

C. **Count 16**

Count 16 contains general allegations without any reference to specific conduct. It alleges that the United States "exercised substantial supervision over the day-to-day activities of the Wyatt, Franklin County Jail and Franklin County House of Corrections" and therefore, is liable for alleged tortious acts by their employees. Since there is no similar allegation in the Administrative Claim regarding supervision of the Contract Jails, Count 16 should be dismissed in its entirety. Id.

Moreover, the Administrative Claim does not even mention the Franklin County House of Corrections. Therefore, all allegations that the United States should be held liable for acts of employees of the Franklin County House of Corrections should be dismissed.

III. ALLEGATIONS IN COUNT 15, PARAGRAPH 229 (a)-(d) SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

The allegations in Count 15 paragraph 229(a)-(d) of the Complaint should pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

A. Notice and Due Procss

The United States can only be sued under Federal Torts Claim Act for claims of "injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission

occurred." 28 U.S.C. § 1356(b)(1) (emphasis added). "[F]or liability to arise under the FTCA, a plaintiff's cause of action must be 'comparable' to a 'cause of action against a private citizen recognized in the jurisdiction where the tort occurred, and his allegations, taken as true, must satisfy the necessary elements of that comparable state cause of action." Abreu v. United States, 468 F.3d 20, 23 (1st Cir. 2006)(quoting Dorking Genetics v. United States, 76 F.3d 1261, 1266 (2d Cir.1996)). Plaintiff's claims relating to notice and due process violations do not meet this standard since there is no comparable Rhode Island tort for which a private person could be sued.

Moreover, the allegations in Count 15, paragraph 229 (a)-(b) regarding notice and due process were litigated in the immigration courts. See Decision of the Board of Immigration Appeals dated August 5, 2008, is attached hereto as Ex. C. The doctrine of *res judicata* bars all parties from relitigating issues which were raised or could have been raised in a previous action, once a court has entered a final judgment on the merits in the previous action. See Westcott Construction Corp., v. Firemen's Fund of New Jersey, 996 F.2d 14, 16-17 (1st Cir. 1993); Aunyx Corp., v. Canon U.S.A., Inc., 978 F.2d, 3, 6-8 (1st Cir. 1992); United States v. Alky Enterprises, Inc., 969 F.2d 1309, 1314 (1st Cir.1992); Kale v. Combined Insurance Co., 924 F.2d 1161, 1165 (1st Cir. 1991).

Finally, even if these allegations could be brought under the FTCA, the statute of limitations has long run on any claim that Mr. Ng was not provided with notice or due process. According to the decision of the Board of Immigration Appeals, Mr. Ng was scheduled to appear at his removal proceedings on February 2, 2001. He was ordered removed in abstentia when he did not appear at that hearing. Years later, in 2007, Mr. Ng claimed he did not have notice of the February 2, 2001 hearing. However, the record contained a February 13, 2001 letter requesting tapes of the hearing from attorney Theodore Cox, representing Mr. Ng. Thus, at a minimum, Mr.

Ng knew there had been a hearing as of February 13, 2001 but likely prior to February 2, 2001. To be timely, Plaintiff's administrative claim had to be filed within the two-year FTCA statute of limitations. See 28 U.S.C. § 2401(b). Plaintiff's administrative claim was not filed until January 2009. Thus, any claim relating to whether notice and due process was afforded at the 2001 hearing is clearly untimely. See McIntyre v. United States, 367 F.3d 38, 51-52 (1st Cir. 2004).

B. 120-Day Custody Review

Paragraph 229(c) should be dismissed because there is no comparable tort under Rhode Island law, and therefore, it is not a proper FTCA claim. See Abreu, 468 F.3d at 23. Furthermore, as a matter of law there is no 120-day custody review requirement, and the failure to conduct such a review is, therefore, not tortious conduct.

C. Ordering Mr. Ng to Hartford

Likewise, the allegations in paragraph 229(d) should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) since "ordering a prisoner to be transported to Harford" is not tortious conduct under Rhode Island law. See Abreu, 468 F.3d at 23. When read in connection with the rest of the complaint, clearly the issue is the manner in which Mr. Ng was transported to Hartford, not the fact that he was ordered there. The claimed tortious conduct is alleged to have been done by employees of Wyatt not ICE. See Complaint ¶¶ 88-93, 95-99.

WHEREFORE, for the reasons stated above, the United States respectfully requests that the Court dismiss the allegations in the Second Amended Complaint against the United States

Dated: October 6, 2009

Paula D. Silsby
United States Attorney

/s/ Hélène Kazanjian
Special Attorney to the
United States Attorney General
100 Middle Street
East Tower, 6th Floor
Portland, Maine 04101
(207) 771-3246
helene.kazanjian@usdoj.gov