

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, et al.

Defendants.

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Civ. A. No. SA:12-cv-1002-FB-HJB

DEFENDANTS’ OPPOSITION TO PLAINTIFF’S
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

I. Introduction

On June 11, 2013, this Court filed its Report and Recommendation regarding, in relevant part, the United States’ Motion to Dismiss, or, in the Alternative, for Summary Judgment. The Court recommended that the United States’ motion be granted in part, and that the case be dismissed without prejudice, on the grounds that plaintiff lacked standing and the Court lacked jurisdiction. The Court, however, recommended that plaintiff be allowed to amend his complaint “to allege a new cause of action, which Plaintiff has standing to bring and upon which the Court has jurisdiction to act.” Report and Recommendation at 11.

Although the District Court has not yet acted on the Court’s recommendations, on June 26, 2011, plaintiff sought leave to file his Amended Complaint. The United States opposes this motion, on the grounds that filing this complaint would be futile, as plaintiff has not and cannot comply with the Court’s jurisdictional prerequisite. As is apparent from the Amended Complaint filed with plaintiff’s motion, he has not alleged a cause of action in which he personally has

standing or the Court has jurisdiction. Moreover, he cannot represent his cousin pro se in federal court.

The Court has discretion to deny leave to amend a complaint where “the futility of amendment [is] readily apparent, and the record provide[s] ample and obvious grounds for denying the motion based on futility.” Pervasive Software Inc. v. Lexware GmbH & Co. KG, 688 F.3d 214, 232 (5th Cir. 2012). As explained below, plaintiff’s Motion for Leave to File his Amended Complaint is futile and should be denied.

II. Plaintiff’s Power of Attorney Does Not Allow Him to Represent His Cousin’s Interests or Provide Him With Standing

Plaintiff has submitted a power of attorney with his tendered Amended Complaint. See Exhibit 26 to Amended Complaint. Plaintiff also states that Douglas Kelder, the next-of-kin, has “designated Plaintiff as his Attorney in Fact for all purposes regarding the disposition of the remains of Arthur H. Kelder. Amended Complaint ¶ 2.

However, a power of attorney does not allow plaintiff to represent third parties *pro se* before this court. 28 U.S.C. § 1624; *see, e.g., Estate of Keatinge v. Biddle*, 316 F.3d 7, 14 (1st Cir.2002) (“[T]he holder of a power of attorney is not authorized to appear pro se on behalf of the grantor.”); Powerserve Int’l, Inc. v. Lavi, 239 F.3d 508, 514 (2nd Cir.2001) (“attorney-in-fact” for daughter not permitted to litigate pro se on her behalf); United States’ Motion to Dismiss at 28 and cases cited therein.

Moreover, “[t]he grant of a power of attorney ... is not the equivalent of an assignment of ownership; and, standing alone, a power of attorney does not enable the grantee to bring suit in his own name.”). Advanced Magnetics, Inc. v. Bayfront Partners Inc., 106 F.3d 11, 17-18 (2d Cir.1997). A revocable power of attorney such as the one submitted by plaintiff does not purport to assign any tangible claims, even assuming plaintiff had identified any such claims. Cf. id.

Finally, the fact that plaintiff may have been granted the right to proceed before the agency on a power of attorney, does not serve to give plaintiff Article III standing. *See* United States' Motion to Dismiss at 25-27 and cases cited.

Accordingly, for all of the above reasons, plaintiff may not assert the rights of Douglas Kelder, if any, in this action. To appear *pro se* in federal court, and to establish standing under Article III, plaintiff must allege a cognizable injury to his own legal interest.

III. This Court Correctly Found That It Lacked Jurisdiction for Four of the Amended Complaint's Five Counts

Even setting aside the standing and representational issues, plaintiff's amended complaint does not cure the jurisdictional issues previously identified by this Court. Counts 1-4 of the Amended Complaint are essentially identical to claims raised in plaintiff's original complaint. Counts 1 and 2 restate his APA claims, while Counts 3 and 4 reiterate his requests for declaratory judgment and mandamus. This Court recommended that plaintiff's APA claims be dismissed for lack of jurisdiction. Specifically, this Court found that these claims were precluded by the Missing Service Personnel Act, 10 U.S.C. §§ 1501, *et seq.* Report and Recommendation at 6-7. The Court found that "both the issues to be reviewed and the persons seeking that review are impliedly precluded." *Id.* at 7. Nothing in plaintiff's tendered Amended Complaint cures this finding.

Counts 3 and 4 similarly restate plaintiff's earlier requests for relief under the Declaratory Judgement Act and the Mandamus Act which this Court also recommended be dismissed. As the Court earlier found, the Declaratory Judgment Act does not provide an independent basis for jurisdiction. *Id.* With respect to the mandamus action, the Court found that plaintiff had failed to identify a duty specifically to him. *Id.* at 8-9. Nothing in plaintiff's tendered Amended Complaint points to any such duty.

Accordingly, even putting aside plaintiff's clear lack of standing, plaintiff's amended complaint does not remedy this Court's lack of jurisdiction over these claims. Allowing amendment would be futile and plaintiff's motion should be denied.

IV. Plaintiff's Due Process Claim Is Also Futile

Plaintiff's sole new claim alleges due process violations which appear to sound in tort. Amended Complaint ¶¶ 121-129. In this cause of action, plaintiff appears to name defendants in their individual,¹ as well as official, capacities. There are a myriad of defects in this cause of action, but leave to amend should be denied because plaintiff's attempt to construe his claim as a tort claim is manifestly futile.

First, as discussed above, plaintiff has failed to allege any facts to support Article III standing under any construction of this claim. Plaintiff may not base his tort claims, any more than he can his APA claims, on the alleged violation of rights, if any, of a third party. Conn v. Gabbert, 526 U.S. 286, 292-93 (1999). Nor, as pointed out above, can he, *pro se*, represent a third party. Finally, plaintiff has not alleged a cognizable interest, even of a third party, in unidentified remains. By definition, unknown remains have no known next-of-kin.

¹ Damages claims against federal employees as individuals are called *Bivens* claims after *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Supreme Court permitted a constitutional damages suit against several federal law enforcement agents in their individual capacities. Such a "freestanding damages remedy for a claimed constitutional violation" is "not an automatic entitlement no matter what other means there may be to vindicate a protected interest." Wilkie v. Robbins, 551 U.S. 537, 550 (2007). Implied actions are "disfavored," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009), and "in most instances" the Supreme Court "ha[s] found a *Bivens* remedy unjustified," *Wilkie*, 551 U.S. at 550.

To the extent plaintiff purports to sue federal officials in their individual capacity, the undersigned does not represent these individuals in this action. If this complaint is allowed to be filed, these individuals would have the right to seek representation by Department of Justice attorneys. 28 C.F.R. 50.15. In addition to the standing issue discussed *infra*, these individuals would be entitled to assert a variety of defenses ranging from lack of a remedy under *Bivens*, to lack of personal jurisdiction.

Second, putting aside standing, plaintiff's tort claims, like his APA claims, also suffer fatal jurisdictional defects. With respect to damages claims against the United States, and defendants in their official capacities, the Federal Tort Claims Act (FTCA) provides the "exclusive vehicle" Congress has allowed for asserting tort claims against the United States, and even that vehicle is "subject to strict limitations." In re Supreme Beef Processors, Inc., 468 F.3d 248, 251-52 (5th Cir. 2006)(en banc). The FTCA does not waive sovereign immunity for constitutional damages claims against the United States or its agencies. FDIC v. Meyer, 510 U.S. 471, 477-78 (1994). A plaintiff bears the burden of alleging facts that would demonstrate an "unequivocal" waiver of sovereign immunity, *see Spotts v. United States*, 613 F.3d 559, 568 (5th Cir. 2010).

Without addressing all of the FTCA limitations that apply to plaintiff's claim, the United States notes that there is no allegation that plaintiff has filed an administrative claim for damages. As part of the waiver of sovereign immunity, the FTCA requires that a complainant file an administrative claim with the United States setting out his allegations and the alleged injuries. 28 U.S.C. § 2675(a). Failure to do so will result in dismissal for lack of subject matter jurisdiction. Reynolds v. United States, 748 F.2d 291, 292 (5th Cir.1984).

In sum, there is no indication from plaintiff's amended complaint to indicate that he will be able to allege, as this Court mandated, a "new cause of action, which Plaintiff has standing to bring and upon which the Court has jurisdiction to act." Report at 11. Plaintiff's tort claim satisfies neither of these prerequisites and thus leave to amend should be denied as futile.

V. Conclusion

At its core, this case is a dispute between plaintiff and defendants over the likelihood of a successful identification should certain remains be disinterred. As reflected in the record,

defendants have examined the evidence produced by plaintiff. Although no final decision has been made, defendants have reached a different conclusion than plaintiff regarding the strength of that evidence.

As explained in our Motion to dismiss, Congress has chosen to vest discretion over disinterment decisions, as well as the accounting mission as a whole, in the expert agencies within the Department of Defense. As this Court found, Congress also precluded review of the issue under the MSPA, and therefore under the APA. Since, for these reasons, plaintiff has not and cannot allege a cognizable constitutional or statutory interest or injury, plaintiff's motion for leave to amend should be denied as futile.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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