

negligently inflicted emotional distress against plaintiffs (Count Five); intentionally inflicted emotional distress against plaintiffs (Count Six); was negligent and careless in entering plaintiffs' home and detaining plaintiffs (Count Seven); invaded plaintiffs' privacy (Count Eight); and trespassed on plaintiffs' property (Count Nine).

By order of this Court [**Doc. #34**], the United States has been substituted for defendant Rasey on Counts Two through Nine, all of which allege violations of state law.¹ The United States now moves to dismiss Counts Two through Nine on the ground that plaintiffs have failed to exhaust their administrative remedies and that this Court therefore lacks subject matter jurisdiction to hear those claims. For the reasons set forth below, the United States' motion is GRANTED.

Standard of Review

¹ When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General, or his delegate, to certify that the employee was acting within the scope of his office or employment at the time of the incident giving rise to a claim. See 28 U.S.C. § 2679(d)(1); 28 C.F.R. § 15.3. Upon such certification, any civil action arising out of that incident is deemed to be an action against the United States, and the United States is substituted as the sole defendant as to those claims. The case then falls under the governance of the Federal Tort Claims Act (the "FTCA"), 28 U.S.C. §§ 1346(b), 2671 et seq. The FTCA provides that a suit against the United States shall be the exclusive remedy for persons with claims for damages resulting from the wrongful or negligent acts or omissions of federal employees taken within the scope of their office or employment. See 28 U.S.C. § 2679(b)(1).

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(1), the Court must accept as true all factual allegations of the complaint and must draw all reasonable inferences in favor of the plaintiff. Ganino v. Citizens Utilities Co., 228 F.3d 154, 161 (2d Cir. 2000). Further, where a defendant challenges the district court's subject matter jurisdiction, the court may resolve disputed factual issues by reference to evidence outside the pleadings, such as affidavits. Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir. 1998). Dismissal is proper only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). However, while the pleading standard in federal court is a liberal one, bald assertions and conclusions of law will not suffice. Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996); see also Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088, 1092 (2d Cir. 1995) (holding that conclusory allegations as to the legal status of defendants' acts need not be accepted as true for purposes of ruling on a motion to dismiss); see generally 2 Moore's Federal Practice § 12.34[1][b] (3d ed. 2001).

Facts

The Court accepts as true the following relevant facts for the purposes of the United States' motion to dismiss.

Plaintiffs Emma, Kim and Reggie Tyson live in Emma Tyson's

home in Windsor, Connecticut. Compl. ¶¶ 1-3. Emma Tyson bought the home on June 22, 1999. Id. ¶ 13. A warranty deed was recorded in the Windsor Land Records on June 23, 1999. Id. ¶ 20.

Defendant Rasey is a Special Agent employed by the Federal Bureau of Investigation. Id. at ¶ 8. Defendants Willauer, Taylor, Pollick, and Bennett are state and local police officers employed by the towns of Bloomfield and Windsor and the State of Connecticut. Id. at ¶ 4-7. On or about October 20, 1999, at approximately 5:57 a.m., plaintiffs were asleep in their beds when various defendants, including Rasey, attempted to execute a federal arrest warrant against a Dennis Rowe. Id. ¶ 15.

Defendants entered the Tyson household through the back and front entrances, allegedly with weapons drawn, carrying battering rams and shouting at plaintiffs to "get down." Id. ¶¶ 16, 17.

Defendants searched closets and other areas of plaintiffs' home. Id. ¶ 19. Plaintiffs showed the property deed to defendants to prove that plaintiff Emma Tyson owned the property and that Dennis Rowe did not reside there. Id. ¶ 20.

Plaintiff Emma Tyson suffered an asthma attack at the time of the search and medics were called to administer breathing treatments. Id. ¶ 25.

Defendants apparently stated that they had entered the wrong premises, and left without further explanation or apology. Id. ¶ 21. According to the Complaint, defendants did not conduct any follow-up investigation or inquiry. Id.

Apparently, Dennis Rowe had at one point lived at plaintiffs' address but had not lived there for approximately four months before the execution of the arrest warrant at plaintiffs' home. Id. ¶ 22. Rowe was later arrested at another property in Windsor, Connecticut. Id.

Plaintiffs claim that neighbors witnessed defendants' attempts to execute the search warrant, and a newspaper apparently later reported that Dennis "Dicky" Rowe, residing at plaintiffs' address, was arrested on drug charges. Id. ¶ 24.

Discussion

The substituted defendant, the United States, contends that plaintiffs' claims against it must be dismissed for lack of subject matter jurisdiction. Specifically, the United States argues that plaintiffs failed to exhaust their administrative remedies under the Federal Tort Claims Act (the "FTCA"), which provides that "[a]n action shall not be instituted upon a claim against the United States for money damages for 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...." 28 U.S.C. § 2675(a). Since the FTCA constitutes a waiver of sovereign immunity, the procedures set forth in section 2675 "must be adhered to strictly." Keene Corp. v. United States, 700 F.2d 836, 841 (2d Cir. 1983). Failure to file a claim for damages with the

appropriate agency precludes this Court from exercising jurisdiction over such claims. Id.

Plaintiffs concede that they have not filed a claim for damages with the appropriate federal agency; however, they contend that their claims in Counts Three through Nine do not fall under the FTCA because Rasey was not acting within the scope of his employment and that the government's scope of employment certification is therefore invalid. Plaintiffs also argue that their claim in Count Two does not fall under the FTCA because it alleges a violation of the Connecticut constitution, not a common law tort. Before deciding whether we may exercise jurisdiction over plaintiffs' claims against the United States, we must first decide whether those claims are governed by the FTCA.

I. Scope of Employment Challenge

In McHugh v. University of Vermont, 966 F.2d 67, 74 (2d Cir. 1992), the Second Circuit held that the district court's de novo review of the Attorney General's scope of employment certification is triggered "by the government's motion for substitution and opposition papers from the plaintiff that allege with particularity facts relevant to the scope-of-employment issue." As noted above, the United States was substituted for Rasey by order of this Court dated January 28, 2002. Notwithstanding the fact that plaintiffs failed to oppose the substitution at that time, we will address the merits of their

argument in the interests of judicial economy, convenience and fairness to the parties.

Plaintiffs bear the burden of proving that Rasey acted outside the scope of his employment. Plaintiffs' burden is met if they submit specific evidence or at least forecast specific evidence that contradicts the Attorney General's certification; mere conclusory allegations and speculation will not suffice. Gutierrez de Martinez v. Drug Enforcement Admin., 111 F.3d 1148, 1155 (4th Cir.), cert. denied Gutierrez de Martinez v. Lamagno, 522 U.S. 931 (1997); McAdams v. Reno, 64 F.3d 1137, 1145 (8th Cir. 1995) (certification is prima facie proof that the challenged conduct was within the scope of employment; burden is on plaintiff to come forward with specific facts to rebut it); Schrob v. Catterson, 967 F.2d 929, 935 (3d Cir. 1992) (certification is prima facie evidence that an employee's challenged conduct was within the scope of employment and the burden then shifts to the plaintiff, who must come forward with specific facts rebutting the certification). If plaintiffs' evidence is sufficient to carry the burden of proof, Rasey or the United States may come forward with evidence in support of the certification.

In this case, plaintiffs merely state that Rasey's alleged tortious conduct cannot be within the scope of his employment because "[i]n no way can these intentional actions have been done 'with a view of furthering' the business of the United States."

(Pls.' Mem. Law Opp'n Defs.' Mot. Dismiss at 4.) This conclusory statement does not suffice to refute the scope of employment certification. Even if we were to conduct a review of the limited facts provided by the parties of this claim against Rasey, we would conclude, as a matter of law, that Rasey was acting within the scope of his employment when he attempted to execute the federal arrest warrant.

We look to the law of Connecticut to determine whether a federal employee was acting within the scope of his employment. Palmer v. United States, 93 F.3d 196, 198 (5th Cir. 1996), McHugh, 966 F.2d at 75. Under Connecticut law, "[a] servant acts within the scope of employment while engaged in the service of the master...." A-G Foods, Inc. v. Pepperidge Farm, Inc., 216 Conn. 200, 209-10 (1990). An employer is liable only for those torts of an employee "which are done with a view of furthering [the employer's] business...." Bradlow v. American District Telegraph Co., 131 Conn. 192, 196 (1944). An employee is not acting within the scope of his employment if he has "abandoned" his master's business. A-G Foods, Inc., 216 Conn. 209-10. Plaintiffs seem to think that intentional torts automatically fall outside the scope of one's employment. It is well settled, however, that conduct, including an intentional tort, is within the scope of employment when "actuated, at least in part, by a purpose to serve [the employer]...." Id. at 210.

The Complaint does not contain a single factual allegation

to indicate that Rasey was acting solely for his own interest. Although the issue of whether an employee has departed from the scope of employment by acting purely for his own interest, rather than at least in part for the employer, is normally a question for the jury, plaintiffs' mere conclusory allegations that Rasey acted "wrongfully and unreasonably" in searching their home and in detaining them inside their home, are insufficient to meet their present burden. Rasey was attempting to execute a federal arrest warrant at plaintiffs' home during the incident in question. Even if he committed intentional or negligent torts during that attempt, his conduct nevertheless fell within the scope of his employment. Plaintiffs have produced no evidence, nor have they forecast the production of specific evidence, to suggest that Rasey had abandoned his employer's purpose. Consequently, we find that Rasey was acting within the scope of his employment at the time of his alleged unlawful conduct. Accordingly, we find that the United States was properly substituted in Counts Three through Nine.²

II. State Constitutional Claim

Plaintiffs contend that the United States was improperly substituted for Rasey in Count Two on the basis that the FTCA applies only to tort claims against federal employees, not to state constitutional claims. See 28 U.S.C. § 2679(b)(1). In

² Plaintiffs appear to concede that the United States was properly substituted for Rasey in Counts Four and Seven.

support of this assertion, plaintiffs cite Rivera v. Heyman, in which the Second Circuit noted that "[t]he certification procedure of § 2679(d)(1) applies only to tort claims, not to discrimination claims under the [State and City of New York's] Human Rights Laws...." Rivera v. Heyman, 157 F.3d 101, 105 (2d Cir. 1998) (noting that the purpose of the FTCA is to protect federal employees from personal liability for common law torts committed within the scope of employment). However, plaintiffs misstate the holding in Rivera. The plaintiff in Rivera argued that because the United States did not substitute itself as a defendant in that case, in accordance with § 2679(d)(1), the individual federal defendants were acting outside the scope of their employment when they discriminated against him. According to the plaintiff, dismissal of his claim against those defendants would "effectively immunize them from liability for their private acts outside the scope of their employment." Id. It was in response to that assertion that the Second Circuit noted that the certification procedure of § 2679(d)(1) did not apply to discrimination claims under the New York's Human Rights Laws. There is no precedent in this or any other Circuit supporting plaintiffs' claim that the FTCA does not apply to state constitutional claims against federal employees.

Congress created only two exceptions to the Westfall Act - federal constitutional claims and federal statutory claims. 28 U.S.C. § 2679(b)(2); United States v. Smith, 499 U.S. 160, 166-67

(1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception that would preserve tort liability for Government employees when a suit is barred under the FTCA"). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." Andrus v. Glover Construction Co., 446 U.S. 608, 616-617 (1980). We decline plaintiffs' invitation to infer a third exception to the FTCA. Accordingly, we hold that the United States was properly substituted in Count Two.

III. Exhaustion of Administrative Remedies

Having decided that plaintiffs' claims against the United States do indeed fall under the FTCA and that the United States was properly substituted for defendant Rasey, we hold that plaintiffs' failure to file a claim for damages with the appropriate agency precludes this Court from exercising jurisdiction over such claims. Counts Two through Nine against the United States are therefore dismissed without prejudice to the plaintiffs' filing of an administrative claim for their alleged injuries.³

³ The United States argues that the filing of an administrative claim will be untimely. See 28 U.S.C. § 2401(b). This Court need not address the merits of the government's argument, as that issue may be more appropriately raised before the federal agency itself.

Conclusion

For the reasons set forth above, the government's motion to dismiss [Doc. # 35] Counts Two through Nine is GRANTED as to the United States.

SO ORDERED.

Dated: May 28, 2002
Waterbury, CT

_____/s/_____
Gerard L. Goettel
United States District Judge