

Ades v. United States

United States District Court for the Eastern District of Texas, Sherman Division

December 16, 2020, Decided; December 16, 2020, Filed

CIVIL ACTION NO. 4:20-CV-00089-RWS-CAN

Reporter

2020 U.S. Dist. LEXIS 251828 *; 2020 WL 8832502

BRUCE ALLAN ADES, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Subsequent History: Adopted by, Objection overruled by, Dismissed by, Without prejudice Ades v. United States Dep't of the Treasury, 2021 U.S. Dist. LEXIS 19232, 2021 WL 345911 (E.D. Tex., Feb. 2, 2021)

Related proceeding at, Magistrate's recommendation at Ades v. United States, 2021 U.S. Dist. LEXIS 248994 (N.D. Tex., Dec. 7, 2021)

Prior History: Ades v. United States, 2020 U.S. Dist. LEXIS 205602 (E.D. Tex., Sept. 23, 2020)

Counsel: 2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 1 Bruce Allan Ades, Plaintiff, Pro se, Carrollton, TX.

For U.S. Department of the Treasury; Bureau of the Fiscal Service, United States of America, Defendants: Thomas Michael Herrin, LEAD ATTORNEY, U.S. Department of Justice, Dallas, TX.

Judges: Christine A. Nowak, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Christine A. Nowak

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendant United States of America's "Motion to Dismiss Plaintiff's First Amended Complaint" [Dkt. 23]. After reviewing the Government's Motion to Dismiss, Plaintiff Bruce Allan Ades's Response [Dkt. 25], and all other relevant filings, the Court recommends the Government's Motion to Dismiss [Dkt. 23] be **GRANTED** and Plaintiff Bruce Allan Ades's

claim(s) under the Federal Tort Claims Act be **DISMISSED WITHOUT PREJUDICE**.

RELEVANT BACKGROUND

Plaintiff, a Texas resident, filed his Complaint in the Eastern District of Texas on February 7, 2020, asserting a claim for "impermissible threat of debt collection activities" against the United States Department of the Treasury Bureau of the Fiscal Service [Dkts. 1; 1-1]. In response, the Government moved to dismiss Plaintiff's claims, in part, based upon sovereign immunity **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 2** [Dkt. 11]. The Government urged Plaintiff pleaded no waiver of sovereign immunity in his complaint depriving the Court of jurisdiction [Dkt. 11]. Plaintiff responded that because "he ha[d] been harmed by both negligent and intentional torts" his claims fell within the scope of the Federal Tort Claims Act ("FTCA") [Dkt. 12 at 11-12]. "The FTCA is a limited waiver of sovereign immunity that allows plaintiffs to bring state law tort actions against the federal government." *Tsolmon v. United States*, 841 F.3d 378, 382 (5th Cir. 2016) (citing 28 U.S.C. § 2674). On July 21, 2020, the Court denied the Government's first Motion to Dismiss, as moot without prejudice to refile, and ordered Plaintiff to file an amended complaint "setting forth the basis for this Court's jurisdiction over this litigation, the basis for Defendant's liability, and whether or not Defendant has waived its sovereign immunity to suit" [Dkt. 18 at 4]. On July 27, 2020, Plaintiff filed his First Amended Complaint—the live pleading—asserting a single claim under the FTCA against the sole defendant, the United States of America [Dkt. 19].

Plaintiff's First Amended Complaint details events originating approximately fourteen years ago. Sometime in 2006, Plaintiff and his then spouse were audited **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 3** by the Internal Revenue Service regarding tax years 2001 to 2004 [Dkt. 19 at 6]. Thereafter, Plaintiff alleges that both

he and his former spouse signed an agreement on September 6, 2006 ("2006 Closing Agreement") whereby Plaintiff agreed to pay a "FBAR penalty" to the Government and wrote a check for over six thousand dollars, representing ten percent of the FBAR penalty due [Dkt. 19 at 7].

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"FBAR" is an acronym for "Report of Foreign Bank and Financial Accounts." *Report of Foreign Bank and Financial Accounts (FBAR)*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar> (last visited Dec. 1, 2020).

Plaintiff claims he had not been in contact with the Government regarding the penalty since 2007—"a period of approximately 13 years" [Dkt. 19 at 6-7]. Then in February 2020, the Government appears to have initiated further collection efforts, re-contacting Plaintiff regarding the remaining penalty balance [Dkt. 19 at 12]. Plaintiff concedes that he still owes approximately fifty-five thousand dollars in principal and approximately ninety thousand dollars in non-principal under the 2006 Closing Agreement [Dkt. 19 at 8]. Plaintiff offers numerous grounds for seeking relief under the FTCA: a delay of over thirteen years in seeking collection of the 2006 Closing Agreement; the Government's unlawful threat that failure to sign the 2006 Closing Agreement "would result in forfeiture of Plaintiff's entire **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 4** net worth PLUS costs of enforcement" (which renders the agreement void); the Government's ministerial failures to follow federal law by seeking collection even though the statute of limitations for collection has passed; and the Government has sought to collect from him but not his former spouse [Dkt. 19 at 12-13]. Plaintiff pleads that all the Government's acts and omissions that give rise to the instant suit are "ministerial acts" under the FTCA [Dkt. 19 at 11]. Plaintiff seeks monetary damages, costs of suit, and post-judgment interest [Dkt. 19 at 15].

The Government filed the instant Motion to Dismiss on August 28, 2020, seeking dismissal of Plaintiff's First Amended Complaint under Federal Rules of Civil Procedure 12(b)(1), (2), (5), and (6) [Dkt. 23] and arguing the Court lacks subject-matter jurisdiction because Plaintiff failed to exhaust his administrative remedies and because no waiver of sovereign immunity exists; Plaintiff failed to properly serve; the Court lacks personal jurisdiction; Plaintiff has failed to state a claim; and Plaintiff's claims are barred by limitations. The

Government further details the events surrounding the 2006 Closing Agreement whereby Plaintiff **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 5** allegedly "agreed to a penalty due for 2003 'under 31 U.S.C. section 5321(a)(5) in the amount of \$62,852 for failure to file a Report of Foreign Bank and Financial Accounts ('FBAR') and waived all defenses including those based on statutes of limitation for assessment and collection" [Dkt. 23 at 3]. Plaintiff filed his Response to the request for dismissal two days later [Dkt. 25]. On November 6, 2020, in conjunction with the denial of a separate motion for default judgment filed by Plaintiff, the Court ordered Plaintiff to properly serve the United States with a copy of the First Amended Complaint [Dkt. 29]. Summons were returned executed on November 19, 2020 [Dkt. 32].

APPLICABLE LEGAL STANDARD

The Government moves to dismiss Plaintiff's Amended Complaint, in part, on sovereign immunity grounds [Dkt. 23 at 7-11]. "Courts consider whether the FTCA applies via a Rule 12(b)(1) motion, because whether the government has waived its sovereign immunity goes to the court's subject matter jurisdiction." *Tsolmon*, 841 F.3d at 382 (citation omitted).

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Other in-circuit courts, including this Court, have dismissed FTCA claims after finding a failure to exhaust under Rule 12(b)(1). *See, e.g., Caldwell v. United States*, No. 4:03-cv-489 (E.D. Tex. 2003); *Ellis v. Dep't of Veterans Affairs*, No. 1:15-CV-00227-RC, 2016 U.S. Dist. LEXIS 184163, 2016 WL 11190108, at *1-4 (E.D. Tex. Dec. 1, 2016), *report and recommendation adopted*, No. 1:15-CV-227, 2017 U.S. Dist. LEXIS 21165, 2017 WL 603322 (E.D. Tex. Feb. 14, 2017); *United States v. Hollis*, No. SA-08-CV-0362 NN, 2008 U.S. Dist. LEXIS 69779, 2008 WL 4179474, at *2 (W.D. Tex. Sept. 7, 2008); *McKendall v. U.S. Army Corps of Engineers New Orleans Dist.*, No. 11-2964, 2014 U.S. Dist. LEXIS 17800, 2014 WL 556735, at *2-3 (E.D. La. Feb. 11, 2014); *Johnson v. United States*, No. 3:98CV159-B-A, 1999 U.S. Dist. LEXIS 13440, 1999 WL 33537218, at *1-2 (N.D. Miss. June 14, 1999); *Frost v. Young*, No. 2:12-CV-1985, 2012 U.S. Dist. LEXIS 171996, 2012 WL 6043031, at *8 (W.D. La. Dec. 3, 2012).

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider

the 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). As whether a federal court has jurisdiction **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 6** must "be established as a threshold matter" and is "inflexible and without exception." *Webb v. Davis*, 940 F.3d 892, 896 (5th Cir. 2019) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). Jurisdiction over a FTCA action against the United States is no exception. *Prier v. U.S. Postal Serv.*, No. 13-0794, 2015 U.S. Dist. LEXIS 72552, 2015 WL 3555887, at *1 (W.D. La. June 4, 2015); *Kirabira v. Bureau of Immigration & Customs Enf't*, No. 3:08CV01025-B, 2009 U.S. Dist. LEXIS 1666, 2009 WL 81095, at *3 (N.D. Tex. Jan. 12, 2009). As such, the Court first considers the Government's assertions related to sovereign immunity/exhaustion.

ANALYSIS

"Subject-matter jurisdiction is essential for the federal judiciary to hear a case." *The Lamar Co., L.L.C. v. Mississippi Transp. Comm'n*, 976 F.3d 524, 528 (5th Cir. 2020). The Government principally contends the Court lacks subject-matter jurisdiction because Plaintiff failed to exhaust his administrative remedies.

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In the alternative, the Government argues Plaintiff failed to properly serve, the Court lacks personal jurisdiction, Plaintiff has failed to state a claim, and Plaintiff's claims are barred by limitations. The Court does not reach these grounds. *See generally Cascabel Cattle Co., L.L.C.*, 955 F.3d at 453 (5th Cir. 2020) ("Because we lack jurisdiction, we do not consider the merits of the case.").

Plaintiff, in response, argues there are facts "not presently available" and that he is unable to exhaust administrative remedies because "there are no published administrative procedures" for exhaustion.

Plaintiff's Claims Are Barred by Failure to Exhaust Administrative Remedies

Plaintiff sues the United States of America—the sole defendant—under the FTCA [Dkt. 19 at 1, 3-5, 8-11, 15]. "A plaintiff may only sue the United States if **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 7** its sovereign immunity is explicitly waived in a federal statute[.]" *Ellis v. Dep't of Veterans Affairs*, No. 1:15-CV-

00227-RC, 2016 U.S. Dist. LEXIS 184163, 2016 WL 11190108, at *2 (E.D. Tex. Dec. 1, 2016) (citing *Farmer v. La. Elec. & Fin. Crimes Task Force*, 553 F. App'x 386, 388 (5th Cir. 2014) (per curiam); *Jeanmarie v. United States*, 242 F.3d 600, 602 (5th Cir. 2001)), *report and recommendation adopted*, No. 1:15-CV-227, 2017 U.S. Dist. LEXIS 21165, 2017 WL 603322 (E.D. Tex. Feb. 14, 2017). "With the FTCA, Congress waived the United States' sovereign immunity as to some claims and not others." *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020) (citing *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 484-85 (2006)), 126 S. Ct. 1252, 163 L. Ed. 2d 1079. More specifically, Congress waived the United States' sovereign immunity in a civil action against the United States for money damages

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, 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. § 1346(b)(1); *see also M.D.C.G. v. United States*, 956 F.3d 762, 768 (5th Cir. 2020). Prior to commencement of a suit, however, the claims must be exhausted. The requirement of exhaustion of administrative review is a jurisdictional prerequisite to the filing of an action under the FTCA. "Exhaustion . . . cannot be waived." *Coleman v. United States*, 912 F.3d 824, 834 (5th Cir. 2019).

The relevant FTCA statute details:

An action shall not be instituted upon a claim against the United States for money **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 8** damages 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, 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 an 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.

28 U.S.C. § 2675(a). "The Supreme Court has recognized that strict compliance with the administrative exhaustion procedures outlined in the FTCA is required

of a plaintiff who institutes an action against the United States." *Mendoza v. United States*, No. 4:20-CV-154-O, 2020 U.S. Dist. LEXIS 214391, 2020 WL 6737871, at *2 (N.D. Tex. Nov. 17, 2020) (citing *McNeil v. United States*, 508 U.S. 106, 112, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993)). Since presentment of an administrative claim is jurisdictional, it must be pleaded and proven by the FTCA claimant. *Barber v. United States*, 642 F. App'x 411, 413 (5th Cir. 2016); *Bustos v. United Parcel Serv., Inc.*, No. H-19-2979, 2020 U.S. Dist. LEXIS 123262, 2020 WL 3965991, at *2 (S.D. Tex. June 30, 2020), *report and recommendation adopted*, No. H-19-2979, 2020 U.S. Dist. LEXIS 122665, 2020 WL 3963761 (S.D. Tex. July 13, 2020). A *pro se* litigant is not excused "from meeting this threshold requirement." *Mendoza*, 2020 U.S. Dist. LEXIS 214391, 2020 WL 6737871, at *4 (citing **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 9** *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir. 1981)).

Plaintiff's live pleading generally alleges that, on or about February 2, 2020, he "presented his claim to the appropriate federal agency for administrative settlement under the FTCA requesting \$100,000.00 or more" [Dkt. 19 at 3]. Plaintiff details the IRS sent him a letter dated February 4, 2020—two days later and three days before filing suit—that stated Plaintiff has "no open or pending issue with the IRS" [Dkt. 19 at 3]. Finally, Plaintiff alleges the IRS sent an email on February 21, 2020—fourteen days after the filing of this suit—that stated the IRS will recommend the Bureau of Fiscal Services assist him in this matter [Dkt. 19 at 3]. Because the Bureau of Fiscal Services did not respond to Plaintiff, Plaintiff claims he timely filed suit because "all apparent administrative alternatives [were] closed or unavailable" [Dkt. 19 at 3]. Plaintiff also asserts "Defendant has stated multiple times in writing that all administrative options have been exhausted" [Dkt. 19 at 8]. Plaintiff does not attach any administrative claim to his live pleading.

The Government claims no administrative claim exists in the record or elsewhere. More specifically, the Government argues Plaintiff's February **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 10** 2, 2020 letter, by which Plaintiff claims presentment, is a Form 911 sent by Plaintiff to the Taxpayer Advocate on February 3, 2020 [Dkt. 23 at 14]. The Government attaches the Form 911, titled "Request for Taxpayer Advocate Service Assistance," to its Motion to Dismiss [Dkt. 23-1].

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A court may consider documents attached to a

motion to dismiss if those documents are referred to in the plaintiff's complaint and are central to the plaintiff's claim. *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). The letter purportedly exhausting administrative remedies is both referenced in the live pleading and central to the FTCA claim. Moreover, Plaintiff does not object.

The Form 911 provided to the Court does not mention any claim under the FTCA and does not otherwise request monetary damages (much less \$100,000.00) [Dkt. 23-1].

Under 28 C.F.R. § 14.2, a claim under the FTCA

shall be deemed to have been presented when a Federal agency receives from a claimant . . . an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident[.]

28 C.F.R. § 14.2(a); *see also Wardsworth v. United States*, 721 F.2d 503, 506 (5th Cir. 1983) (declining to excuse the plaintiff from compliance with the sum certain requirement under § 2675). "The purpose of the FTCA's administrative-presentment requirement is to allow the federal agency promptly to investigate and, if appropriate, settle claims without having to resort to federal courts." *Pleasant v. United States ex rel. Overton Brooks Veterans Admin. Hosp.*, 764 F.3d 445, 448 (5th Cir. 2014) (citations omitted). For that reason, the Fifth Circuit requires "FTCA litigants **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 11** to apprise the government of sufficient facts to put it on notice of actual or potential claims." *Dudley v. United States*, No. 4:19-CV-317-O, 2020 U.S. Dist. LEXIS 16856, 2020 WL 532338, at *10 (N.D. Tex. Feb. 3, 2020). "Although a particular method of giving notice is not required, plaintiffs usually give notice [under the FTCA] by filing a 'Claim for Damage, Injury or Death' with the appropriate federal agency." *West v. Trump*, No. 3:19-CV-2522-K-BH, 2020 U.S. Dist. LEXIS 146921, 2020 WL 4721291, at *3 (N.D. Tex. July 23, 2020) (citing *Cook v. U.S. Dep't of Labor*, 978 F.2d 164, 166 (5th Cir. 1992)), *report and recommendation adopted*, No. 3:19-CV-2522-K, 2020 U.S. Dist. LEXIS 145456, 2020 WL 4698327 (N.D. Tex. Aug. 13, 2020).

Here, the mere fact that Plaintiff did not provide the Government with a Standard Form 95 does not mean he failed to exhaust administrative remedies; however, in addition to such fact, as earlier referenced the Form 911 provided to the Court does not mention or allude to any claim under the FTCA and more importantly does

not request monetary damages or state a sum certain Plaintiff is seeking to recover from the United States [Dkt. 21-1]. On this basis alone, Plaintiff has failed to exhaust administrative remedies; Plaintiff did not provide the appropriate agency with "sufficient written information to begin investigating" and place "a value on his claim." See *Cook*, 978 F.2d at 166; see also *Pleasant v. U.S. ex rel. Overton Brooks Veterans Admin. Hosp.*, 764 F.3d 445, 448 (5th Cir. 2014) ("A claim is properly presented within the meaning of § 2675(a) when the agency is given sufficient **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 12** written notice to commence investigation and the claimant places a value on the claim."). Nor is there any final denial of any claim. In sum, no document reflecting exhaustion is in the record before the Court. See *Banks v. United States*, No. 05-6853, 2007 U.S. Dist. LEXIS 24454, 2007 WL 1030326, at *6 (E.D. La. Mar. 28, 2007) (dismissing the plaintiff's FTCA claims without prejudice after concluding there is no "evidence that a FTCA claim has been presented to the appropriate agency" despite the plaintiffs' allegation that they exhausted their administrative remedies); *Matz v. Fed. Bureau of Prisons*, No. EP-05-CA-408-DB, 2007 U.S. Dist. LEXIS 8842, 2007 WL 496713, at *5 (W.D. Tex. Jan. 12, 2007) (dismissing the plaintiff's FTCA claims without prejudice after concluding the plaintiff has not "provided the Court with evidence that he has exhausted his administrative remedies under the FTCA").

Moreover, "jurisdiction must exist *at the time the complaint is filed*." *Gregory*, 634 F.2d at 204 (emphasis). Even if the Court found the Form 911 could act as presentment of Plaintiff's FTCA claim, Plaintiff's suit was filed less than six months after his claim was submitted and before it was formally denied. See *Price v. United States*, 69 F.3d 46, 54 (5th Cir. 1995) ("An action that is filed before the expiration of the six-month waiting period, and is thus untimely, cannot become timely by the passage of time after the complaint is filed."); *Janise v. Unite* **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 13** *States*, No. 18-725-JWD-RLB, 2019 U.S. Dist. LEXIS 158323, 2019 WL 4452832, at *3 (M.D. La. Sept. 17, 2019) (concluding the plaintiffs failed to exhaust "administrative remedies because they brought this action before filing an administrative claim and without allowing time for a written denial or six months to pass"). Simply put, Plaintiff's failure to meet his burden of demonstrating he exhausted administrative remedies of his FTCA claim prior to filing suit on February 7, 2020, renders the Court without jurisdiction.

Both the Government and Plaintiff advance and argue the exhaustion requirements of the FTCA in this cause. The Government further argues that Plaintiff's FTCA claim is also barred by certain exceptions to the waiver of sovereign immunity under 28 U.S.C. § 2680 [Dkt. 23 at 8-11]. While not urged by the Government, Section 2680(c) provides that the United States' waiver of sovereign immunity does not apply to "[a]ny claim arising in respect of the assessment or collection of any tax[.]" 28 U.S.C. § 2680(c). Notably, Plaintiff urges in his response to the Government's first motion to dismiss that his lawsuit "is not a 'Tax' matter by law or inference" [Dkt. 12 at 1]. Neither Party briefs nor argues § 2680(c) applies, but the Court notes § 2680(c) has been interpreted as "broad enough to encompass activities of an IRS agent [or employee] even remotely related to his or her official duties." *Cato v. Noyes*, No. 18-2935 (RC), 2020 U.S. Dist. LEXIS 47617, 2020 WL 1308347, at *4 (D.D.C. Mar. 19, 2020) (collecting cases). As such, even assuming, *arguendo*, that Plaintiff's suit is properly categorized as a tax matter (as opposed to a tort claim as Plaintiff urges), dismissal would remain appropriate because Plaintiff has failed to exhaust the applicable presentment procedures for tax matters. See *generally* 26 U.S.C. § 7433(d) (stating a court may not award damages, *inter alia*, "in connection with any collection of Federal tax with respect to a taxpayer" unless that "court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service"); *Vidurek v. Koskinen*, No. 17 CV 9064(VB), 2018 U.S. Dist. LEXIS 125282, 2018 WL 3597644, at *7 (S.D.N.Y. July 25, 2018) (describing the exhaustion procedures for seeking "civil damages under the Internal Revenue Code for unauthorized tax collection" and otherwise challenging a plaintiff's "underlying tax liability"); *Pallett v. Johnson*, No. 4:06 CV 3078, 2006 U.S. Dist. LEXIS 75906, 2006 WL 2990356, at *3 (D. Neb. Oct. 18, 2006) (describing the exhaustion procedures for seeking recovery for damages of an IRS officer or employee that "'recklessly or intentionally . . . disregards' the tax laws or regulations and engages in unauthorized collection activities").

In opposition to this conclusion, Plaintiff cites Federal Rule of Civil Procedure 56, arguing Defendant cannot meet its burden under Rule 56 [Dkt. 25 at 3]. Plaintiff misunderstands the application of Rules 12 and 56. Seeking dismissal under Federal Rule of Civil

Procedure 12 and seeking a judgment as a matter of law under Federal Rule of Civil Procedure 56 are entirely distinct concepts. *Compare* FED. R. CIV. P. 12, with FED. R. CIV. P. 56. Here, the Government seeks dismissal under Federal Rule of Civil Procedure 12. See *Tucker v. Parish*, No. 6:11-CV-602-MHS, 2013 U.S. Dist. LEXIS 189421, 2013 WL 12109776, at *8 (E.D. Tex. Sept. 23, 2013) (explaining, in general terms, the distinction between Federal Rules of Civil Procedure 12 and 56). Because the Court lacks subject-matter jurisdiction, the Court lacks authority to consider this case and does not reach the merits. See *The Lamar Co., L.L.C.*, 976 F.3d at 528. Moreover, to the extent Plaintiff argues that consideration of the Form 911 dictates that the Court consider the Rule 12(b)(1) motion as a summary judgment **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 14** motion, "[c]ourts may consider matters outside the pleadings and attachments thereto in resolving a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1)." *Mendoza*, 2020 U.S. Dist. LEXIS 214391, 2020 WL 6737871, at *2 (N.D. Tex. Nov. 17, 2020) (citing *Vinzant v. United States*, No. 2:06-cv-10561, 2010 U.S. Dist. LEXIS 143672, 2010 WL 1857277, at *3 (E.D. La. May 7, 2010)); see also *Tenth St. Residential Ass'n v. City of Dallas, Tex.*, 968 F.3d 492, 498-99 (5th Cir. 2020) (quoting *Robinson v. TCI/US W. Commc'ns Inc.*, 117 F.3d 900, 904 (5th Cir. 1997)) ("In deciding a motion to dismiss for lack of subject matter jurisdiction, a court may consider '(1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'").

Plaintiff also argues there are facts "not presently available" and thus requests time to complete discovery and leave to amend [Dkt. 25 at 2-3; 25-1 at 1-2]. But delaying dismissal to conduct discovery or permitting a second amendment would be futile because the Court lacks subject-matter jurisdiction absent exhaustion of administrative remedies. See *Bustos*, 2020 U.S. Dist. LEXIS 123262, 2020 WL 3965991, at *2 (S.D. Tex. June 30, 2020) (denying leave to amend the complaint as futile because the plaintiff did not exhaust administrative remedies). Plaintiff must instead exhaust his administrative remedies and refile, if he can, "to cure the subject matter jurisdiction problem." *Janise*, 2019 U.S. Dist. LEXIS 158323, 2019 WL 4452832, at *3 (citing *McNeil v. United States*, 964 F.2d 647, 648 (5th Cir. 1992)).

In sum, Plaintiff has the burden to establish subject-matter jurisdiction, and he has **2020 U.S. Dist. LEXIS**

251828 2020 WL 8832502 at 15 not done so. The Court recommends this case be dismissed without prejudice for lack of subject-matter jurisdiction. See *Nunez v. United States*, No. 1:13CV419, 2017 U.S. Dist. LEXIS 45412, 2017 WL 1147787, at *4 (E.D. Tex. Mar. 10, 2017) ("As it has been concluded plaintiff failed to satisfy the FTCA's exhaustion requirement, the additional grounds for dismissal asserted in the defendant's motion need not be addressed."), *report and recommendation adopted*, No. 1:13-CV-419, 2017 U.S. Dist. LEXIS 44641, 2017 WL 1148612 (E.D. Tex. Mar. 27, 2017); *Newmark v. U.S. Postal Serv.*, No. 3:11-CV-605-L, 2011 U.S. Dist. LEXIS 69330, 2011 WL 2559544, at *2-3 (N.D. Tex. June 27, 2011) (declining to reach the Government's alternative arguments after concluding the court lacked subject-matter jurisdiction for failure to exhaust administrative remedies under the FTCA).

CONCLUSION AND RECOMMENDATION

Based on the foregoing, the undersigned recommends that the Government's Motion to Dismiss [Dkt. 23] be **GRANTED** and Plaintiff Bruce Allan Ades's claims under the Federal Tort Claims Act be **DISMISSED WITHOUT PREJUDICE**.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the **2020 U.S. Dist. LEXIS 251828 2020 WL 8832502 at 16** basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. See *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 16th day of December, 2020.

/s/ Christine A. Nowak

Christine A. Nowak

UNITED STATES MAGISTRATE JUDGE

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