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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALTON JONES,

Plaintiff,

vs.

U.S. BORDER PATROL AGENTS GERARDO HERNANDEZ, JODAN JOHNSON, DAVID FAATOALIA, JOSEPH BOWEN, and JOHN KULAKOWSKI, each sued in their individual capacities; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; and UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants.

UNITED STATES OF AMERICA,

Counter-Claimant,

vs.

ALTON JONES,

Counter-Defendant.

Case No. 16-cv-1986-W (WVG)

COUNTER-DEFENDANT ALTON JONES'S MOTION FOR SUMMARY JUDGMENT

Date: March 5, 2018
Court: Hon. Thomas J. Whelan

[No oral argument; L.R. 7.1(d)(1)]

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RULES - OTHER

I. INTRODUCTION

This case arises from an incident occurring August 9, 2014, in which Plaintiff Alton Jones ("Mr. Jones") contends several U.S. Border Patrol agents unlawfully attacked, arrested, searched, and detained him. Mr. Jones commenced this case on August 8, 2016. Defendant the United States of America ("USA") contends that Mr. Jones injured Border Patrol Agent Jodan Johnson during the same incident; in April 2017, the USA filed a counterclaim against Mr. Jones based on an assignment of tort claims from Agent Johnson. Agent Johnson's tort claims are, however, creatures of California law, and under California law, these claims survived for only two years from the date of the incident. Yet Agent Johnson took no action to pursue any tort claims in his own name, and he did not assign those claims until March 23, 2017, seven months after the claims expired. On the undisputed facts, the counterclaim is time-barred and Plaintiff is entitled to judgment as a matter of law, because the USA slept on its rights and did not obtain the assignment until *after* any claims expired. Under controlling precedent, the USA as assignee may not gain greater rights than those of the assignor, and the claim does not relate back to the filing of the initial complaint. Accordingly, this Court should enter summary judgment in favor of Mr. Jones on the USA's counterclaim.

II. FACTS

The undisputed facts establish that the purported injuries forming the basis of the USA's counterclaim occurred on August 9, 2014. First, the amended counterclaim alleges that Agent Johnson suffered an injury as a result of the August 9, 2014 incident involving Mr. Jones. *See* Dkt. 19 ("Am. Counterclaim") ¶¶ 8, 31–33. Second, the assignment Agent Johnson executed states that his injury occurred August 9, 2014. *See* Loy Decl. ¶ 2 and Ex. A ("Johnson Assignment"). Third, Agent Johnson testified that he was allegedly injured by Mr. Jones on August 9, 2014. *See* Loy Decl. ¶ 3 and Ex. B ("Johnson Depo. Tr.") at 290:1–19; 331:7–9. Agent Johnson further testified that emergency medical services ("EMS")

immediately assessed him at the scene of the incident, Johnson Depo. Tr. 228:21–229:3, before transporting him to a nearby emergency room for treatment that same afternoon. *Id.* at 292:19–293:7. Agent Johnson also stated that, while at the emergency room on August 9, 2014, he told two Border Patrol investigators that he felt he had been assaulted by Mr. Jones. *Id.* at 148:23–150:16. The ankle injury is the only injury Agent Johnson claims to have sustained during the August 9, 2014 incident. *Id.* at 352:16–19; 301:6–12.

The undisputed facts also show that Agent Johnson did nothing to pursue a case against Mr. Jones and did not assign any claims to the USA until over two years after the incident. Although Agent Johnson applied for and received benefits from the Department of Labor "within 45 days" of the incident, he took no action to pursue any tort claims against Mr. Jones before attempting to assign them to the United States. *Id.* at 230:25–232:8; 237:18–238:14; 267:3–5. As he testified, "I didn't take the initiative of calling any lawyers or talking to anybody about what I could do." *Id.* at 237:24–238:1. Agent Johnson had no communications about assigning his claims to the USA, with defense counsel in this case or anyone else, before Mr. Jones commenced this action. *Id.* at 242:14–243:1; 243:25–244:20. Finally, Agent Johnson confirmed that he did not execute the assignment until March 23, 2017, over two years after the incident in which he was allegedly injured. *Id.* at 243:35–244:2.

Mr. Jones commenced his lawsuit on August 8, 2016, less than two years after the incident, pleading *Bivens* claims against individual U.S. Border Patrol agents. Dkt. 1. After his administrative claim was denied, Mr. Jones amended the complaint to add claims against the USA under the Federal Tort Claims Act ("FTCA"). Dkt. 9. Agent Johnson assigned his claim against Mr. Jones to the United States on March 23, 2017. Johnson Assignment. On April 7, 2017, the USA filed a counterclaim, Dkt. 17, which it amended three days later. Dkt. 19. The amended counterclaim alleges Mr. Jones committed assault, battery, and negligence

against Agent Johnson, who "assigned his right of recovery to the United States." Am. Counterclaim ¶ 36. It "seeks money damages from Jones … pursuant to an assignment of right to recover under the authority of the Federal Employees Compensation Act ('FECA') … to seek compensation for injuries sustained by an employee" of Border Patrol. *Id.* ¶¶ 2, 4. The counterclaim seeks "[j]udgment against Jones" regardless of whether Jones recovers any damages. *Id.* at 7 ¶ 1.

III. ARGUMENT

A. Legal Standard Governing Motions for Summary Judgment.

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the moving party demonstrates the absence of a genuine issue of fact, the party opposing summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 256 (1986). Where the non-moving party bears the burden of proof on an element of its case, it must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

B. The USA Cannot Pursue Agent Johnson's Tort Claims Because Those Claims Were Creatures of State Law that Expired Under State Law Before He Assigned Them to the USA.

As a federal employee allegedly injured on the job, Agent Johnson sought compensation under FECA. *United States v. Lorenzetti*, 467 U.S. 167, 169 (1984) ("Federal employees who are injured while engaged in the performance of their official duties are entitled under FECA to compensation for medical expenses, lost wages, and vocational rehabilitation."). If the injury "for which compensation is payable" was allegedly "caused under circumstances creating a legal liability on a person other than the United States to pay damages," the government may require the employee to "assign to the United States any right of action he may have to

enforce the liability." 5 U.S.C. § 8131(a). According to the amended counterclaim, Agent Johnson assigned his right of recovery to the USA pursuant to FECA. Am. Counterclaim ¶ 36.

"Since there is no general federal common law of torts," however, any right of action assigned by Agent Johnson to the USA was a creature of state law. *Roemer v. C.I.R.*, 716 F.2d 693, 697 (9th Cir. 1983). Though it allows the USA to pursue tort claims properly assigned by employees, FECA "does not purport to create any right of action, or to provide a mode for enforcement of the state created right of action" assigned by the employee. *Boeing Airplane Co. v. Perry*, 322 F.2d 589, 591 (10th Cir. 1963). "By the assignment, the United States succeed[s] to the [assignor's] interest in the state created right of action, i.e., it stands in the [assignor's] shoes." *Id.* Accordingly, the USA cannot, via a FECA assignment, "acquire a greater right or different status than the [ ] assignor." *Id.* at 591–92; *cf. Louisville & N. R. Co. v. Rochelle*, 252 F.2d 730, 735 (6th Cir. 1958) (without assignment of claims under FECA, "the United States had no interest in the action and was neither a real nor necessary party" to tort case).

Because the rights of action assigned by Agent Johnson are creatures of state law, their lifespan is governed by California law, under which "a plaintiff must bring a cause of action within the limitations period applicable thereto after accrual of the cause of action." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999) (citing Cal. Civ. Proc. Code § 312). Any claim for "assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another" must be brought "[w]ithin two years" of accrual. Cal. Civ. Proc. Code § 335.1.

As set forth above, it is undisputed that Agent Johnson's claims accrued on August 9, 2014, the date on which he claims Mr. Jones injured him. *Norgart*, 21 Cal. 4th at 397 (claim accrues when plaintiff knows or has reason to believe "someone has done something wrong to him" (citation and quotation marks omitted)); *Sonbergh v. MacQuarrie*, 112 Cal. App. 2d 771, 772 (1952) (claims for

assault and battery accrued when "plaintiff was struck by defendant"). Agent Johnson's tort claims against Mr. Jones therefore expired in August 2016.

The undisputed record also establishes that Agent Johnson did not assign his claims to the United States until March 23, 2017—seven and a half months after these claims expired. *See* Johnson Assignment. In deposition, Agent Johnson confirmed this timeline. Johnson Depo. Tr. 240:1–2; 242:14–243:1; 243:25–244:20; 251:10–252:4. Moreover, Agent Johnson took no action to pursue claims against Mr. Jones before this untimely assignment. *Id.* at 237:18–238:14; 267:3–5.

The counterclaim is time-barred by the statute of limitations because it is based on claims that expired before the assignment was executed. *Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126, 141–42 (1938). In *Guaranty Trust*, the United States filed suit on a state law claim that had been assigned by the Russian government. *Id.* at 130. The district court held the claim "was barred by the applicable 6-year statute of limitations" under state law, which had expired before assignment. *Id.* at 131. The Supreme Court held that "[i]f the claim of the Russian Government was barred by limitation" at the time of assignment, "the United States as its assignee can be in no better position." *Id.* at 141.

In such circumstances, where the "statutory period had run before the assignment," the barring of an assigned claim "deprives the United States of no right," because the "United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid." *Id.* at 142; *cf. United States v. California*, 507 U.S. 746, 758–59 (1993) (where federal government had right to be subrogated to contractor's state law claims but "waited until after the state statute of limitations had run against [contractor] to bring suit, the Government was not subrogated to 'a right free of a pre-existing infirmity'" (quoting *Guaranty Trust*, 304 U.S. at 142)).

That principle applies here. Agent Johnson's state law claims accrued on August 9, 2014 and expired two years later—more than seven months *before* they

were assigned on March 23, 2017. The USA is therefore barred from prosecuting these expired claims. *Fed. Deposit Ins. Corp. v. Former Officers & Dirs. of Metro. Bank*, 884 F.2d 1304, 1309 n.4 (9th Cir. 1989) ("If the state statute of limitations has expired before the government acquires a claim, that claim is not revived by transfer to a federal agency."); *Fed. Deposit Ins. Corp. v. Hinkson*, 848 F.2d 432, 434 (3d Cir. 1988) (noting "settled law" that state statute of limitations is "relevant in determining a claim's viability at the time the federal agency gains eligibility to sue. If the state statute of limitations has expired before the government acquires a claim, it is not revived by transfer to a federal agency."); *City of Colton v. Am. Promotional Events, Inc.*, No. ED CV 09-1864 PSG, 2011 WL 486577, at *5 (C.D. Cal. Feb. 4, 2011) ("[T]he United States cannot assert a claim first assigned to it after a state statute of limitations had run, as the claim was deficient before the United States obtained it.").

Although in other circumstances the United States may file an "action for money damages … founded upon a tort … within three years after the right of action first accrues," 28 U.S.C. § 2415(b), this rule does not revive a claim which expired before assignment. "Section 2415 cannot revive claims barred under a state limitations period when the [government] takes over after the claims have been barred under state law," and where the USA succeeds to state law claims that have expired, it "cannot sue under the Section 2415 limitations period." *Resolution Trust Corp. v. Seale*, 13 F.3d 850, 854 (5th Cir. 1994) (claim barred where government succeeded to it after "limitations period … had lapsed").

Accordingly, the USA's counterclaim is time-barred because it is based on an untimely assignment of claims that had expired before the assignment was executed. *Bresson v. C.I.R.*, 213 F.3d 1173, 1176 (9th Cir. 2000) (noting that "if a claim *already has become infirm* (for example, when a limitations period expires) by the time the United States acquires the purported right," it cannot be revived (emphasis in original)). The counterclaim must therefore be dismissed as a matter of law.

C. The Time-Barred Counterclaim Does Not "Relate Back" to the Date This Action Was Commenced.

The USA cannot revive the expired claims by asserting that its time-barred counterclaim "relates back" to the date Mr. Jones commenced this action. Because this case arises under original federal jurisdiction, it is governed by federal law, under which counterclaims for affirmative relief such as damages do not relate back.

Mr. Jones's *Bivens* claims against the individual defendants "invoke[d] the general federal-question jurisdiction of the district courts." *Butz v. Economou*, 438 U.S. 478, 504 (1978). Likewise, Mr. Jones's FTCA claims also arise under original federal jurisdiction. FTCA cases are "civil actions on claims against the United States," over which federal district courts "have exclusive jurisdiction." 28 U.S.C. § 1346(b)(1); *see, e.g.*, *DSI Corp. v. Sec'y of Hous. & Urban Dev.*, 594 F.2d 177, 180 (9th Cir. 1979) ("Tort claims against the United States are exclusively cognizable under the Federal Tort Claims Act.").

In securing an assignment under FECA and pursuing a counterclaim in its own name, the United States also invoked this Court's original federal jurisdiction. 28 U.S.C. § 1345 ("[T]he district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States."); 28 U.S.C. § 1346(c) ("The jurisdiction conferred by this section" for FTCA claims "includes jurisdiction of any . . . counterclaim . . . on the part of the United States against any plaintiff commencing an action under this section").[1]

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[1] *See also, e.g.*, *Amoco Prod. Co. v. United States*, 852 F.2d 1574, 1579 (10th Cir. 1988) (USA's "counterclaim is founded on independent jurisdiction conferred upon the district court by 28 U.S.C. § 1345"); *United States v. Butt*, 203 F.2d 643, 645 (10th Cir. 1953) (where claim was assigned to USA, "[j]urisdiction is given by 28 U.S.C. § 1345"); *Grondal v. United States*, 682 F. Supp. 2d 1203, 1221 (E.D. Wash. 2010) ("This court has jurisdiction over the United States' counterclaim … under 28 U.S.C. § 1345."); *Elfelt v. United States*, 289 F. Supp. 2d 881, 885 (E.D. Mich. 2003) (holding "jurisdiction exists under 28 U.S.C. § 1345 because the government became a 'plaintiff' in this case when it filed its compulsory counterclaim");

Because the counterclaim invokes federal question jurisdiction and is a "federal question case[]," the question whether it "'relates back' to the date the action was commenced for statute of limitations purposes" is governed by "federal common law." *40235 Washington St. Corp. v. Lusardi*, No. CIV. 90-1472-R, 1999 WL 33633157, at *5 (S.D. Cal. Jan. 19, 1999); *cf. Richards v. United States*, 369 U.S. 1, 7 (1962) (where "jurisdiction is based upon a federal statute," there is no need to apply choice of law rules applicable in diversity cases); *Cibula v. United States*, 551 F.3d 316, 321 (4th Cir. 2009) ("[B]ecause the FTCA contains an explicit instruction by Congress regarding which law to use, courts should not engage in their normal *Erie* analysis to make that determination.").

Under federal law, "counterclaims for affirmative relief, such as those at issue here, do not relate back to the filing of the complaint." *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, No. CV 14-03053 MWF (VBKx), 2015 WL 12778355, at *13 (C.D. Cal. Oct. 23, 2015); *see also, e.g.*, *Vari-Build, Inc. v. City of Reno*, 622 F. Supp. 97, 99 (D. Nev. 1985). That remains true regardless of whether the counterclaim is compulsory. *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 206–07 (5th Cir. 2015) (under federal law, "compulsory counterclaims seeking affirmative relief are not tolled" by filing of action); *Allegro Corp. v. Only New Age Music, Inc.*, No. 01-790-HU, 2002 WL 32806161, at *16 (D. Or. Oct. 4, 2002), *report and recommendation adopted*, No. CIV. 01-790-HU, 2003 WL 23571745 (D. Or. Jan. 23, 2003) ("Compulsory counterclaims for affirmative relief will be barred if asserted after the limitations period has run."). Accordingly, the counterclaim does not relate back to when this case was commenced because it seeks affirmative relief in the form of "money damages from Jones." Am. Counterclaim ¶ 2.

Peerless Ins. Co. v. United States, 674 F. Supp. 1202, 1205 (E.D. Va. 1987) ("Jurisdiction for the United States' counterclaim is properly premised on 28 U.S.C. § 1345.").

Significantly, the counterclaim does not plead a mere "claim for recoupment," which even if otherwise "barred by the statute of limitations may be brought to defeat a claim arising out of the same transaction." *Klemens v. Air Line Pilots Ass'n, Int'l*, 736 F.2d 491, 501 (9th Cir. 1984). "Recoupment claims" seek only "the setting off against asserted liability of a counterclaim arising out of the same transaction." *Reiter v. Cooper*, 507 U.S. 258, 264 (1993). Claims for recoupment are "'defensive' counterclaims that arise out of the same transaction, merely seeking to reduce the amount that plaintiff can recover." *40235 Washington St. Corp.*, 1999 WL 33633157, at *5. A recoupment claim, therefore, *cannot* seek damages in excess of the plaintiff's claim, *Fed. Deposit Ins. Corp. v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994); rather, it must be limited to reducing any recovery the plaintiff seeks because of "some feature of the transaction upon which the plaintiff's action is grounded." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 415 (1998).

Here, the counterclaim is not merely defensive. Instead, it seeks the "affirmative relief" of damages against Mr. Jones. *Id.*; *see also Perkins v. Napieralski*, No. CV 01-354-BR, 2001 WL 34047105, at *2 (D. Or. Aug. 9, 2001) ("Only 'defensive' counterclaims that arise out of the same transaction and that seek only to reduce the amount a plaintiff can recover (*e.g.*, recoupment, contribution, indemnity) relate back to the filing of the complaint."). It seeks monetary recovery against Mr. Jones regardless of whether Mr. Jones recovers damages at all, and regardless of the amount Mr. Jones recovers. Indeed, Agent Johnson's claim is factually irreconcilable with Mr. Jones's claim. Accordingly, the counterclaim remains time-barred and must be dismissed as a matter of law, because the undisputed facts demonstrate that the USA slept on its rights by failing to secure assignment of Agent Johnson's claims before they expired.

IV. CONCLUSION

For the foregoing reasons, the Court should enter summary judgment for Plaintiff on the USA's counterclaim, because the undisputed facts establish that this

counterclaim is time-barred and thus Plaintiff is entitled to judgment as a matter of law.

DATED: January 12, 2018 BY: */s/ David Loy*

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