

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Lin Li Qu, et al.)	
<i>Plaintiff,</i>)	
)	
v.)	CA-09-CV-0053-S
)	
Central Falls Detention Facility)	
Corporation, et al.)	
)	
<i>Defendants.</i>)	

**PLAINTIFF’S OPPOSITION TO THE UNITED STATES’
MOTION TO DISMISS**

NOW COMES the Plaintiff, Lin Li Qu, and hereby files this memorandum of law in opposition to Defendant United States of America’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

BACKGROUND

The defendant, United States of America, seeks to absolve itself of any and all liability for the tragic detention, torture, abuse, and death of Hiu Lui Ng in three ways, all of which should be rejected. The United States argues that 1) Wyatt and its employees are independent agents and therefore the United States did nothing for which it can be held liable; 2) the notice provided by Mr. Ng’s widow through the Standard Form 95 administrative claims procedure required by the Federal Tort Claims Act (FTCA) was not specific enough to put it on notice of the claims in the complaint; and 3) it can not be held liable for claims not recognized under Rhode Island law. For the following reasons, Defendant’s arguments in this motion to dismiss must fail.

First, the Plaintiff's claims against the United States are based on allegations of its own actionable conduct and not based on the vicarious liability of Wyatt and others.

Specifically, the United States employees:

- inflicted cruel and unusual punishment on Mr. Ng when they negligently ordered him transported to Hartford, Connecticut when they knew or should have known that his medical condition was severe;
- failed to provide him with medical care after observing his condition in Hartford and then ordered him returned to Wyatt where it knew or should have known he was receiving severely inadequate medical care;
- violated Mr. Ng's due process rights by failing to afford him an appropriate required review of his detention; and
- despite notice and an obligation owed to people under its custody, employees of the United States failed to take action when it knew that Mr. Ng was being seriously mistreated while detained at Wyatt.

Second, the notice pursuant to the FTCA was sufficient and in conformance with the purpose of the administrative claim; and

Third, each of the FTCA claims are based on recognized causes of action under state law.

I. FACTS

The facts are not unfamiliar to this Court and therefore only the pertinent details will be repeated here.

Lin Li Qu, the widow Hiu Lui "Jason" Ng, has filed this lawsuit individually and on behalf of her two minor children, to seek justice for the cruel treatment and

unnecessary death of her husband while in federal government custody. Mr. Ng was a civil immigration detainee who received grossly inadequate medical care while in the custody of the United States Immigration and Customs Enforcement agency (hereinafter “ICE”), the Franklin County Jail (hereinafter “FCJ”), the Franklin County House of Corrections, and at Wyatt.

Despite the fact that employees of the United States had actual notice of the inadequate medical care being afforded to Mr. Ng, the agents of the United States acted negligently and carelessly in failing to ensure his well being. Mr. Ng’s attorneys notified ICE officials in July of 2008 of the lack of adequate medical treatment and care for Mr. Ng. For example, in a July 14, 2008 letter to the ICE Field Office Director in Boston, Massachusetts, Mr. Ng’s attorney requested emergency medical treatment due to his very serious back pain. On July 24, 2008, Mr. Ng’s attorney sent a letter to Office Naydeen Mersereau at ICE in Hartford, Connecticut requesting parole and a custody review due to the fact that Mr. Ng was experiencing serious and rapidly deteriorating health problems, including the fact that he could not feel his legs. Because of this lack of care, Mr. Ng was deprived of his constitutional rights and experienced extreme and unnecessary suffering and ultimately died.

Additionally, agents of the United States wrongfully inflicted extreme and unnecessary pain on Mr. Ng by ordering him to be transported to Hartford despite his near-death medical condition. When asked why he was transported to Hartford, an Assistant United State Attorney told this Court that “he was taken to Hartford so they could afford him a better opportunity to speak by telephone with his counsel in

private...” See Ng v. Chertoff et al., C.A. No. 08-285S, July 31, 2008 Hearing Tr. at 16-17 (attached hereto as Exhibit A.)

Then, in complete dereliction of their duty, with full knowledge of Mr. Ng’s serious condition, they failed to get him medical care and ordered him back to Wyatt, the place where he was being neglected and abused.

Finally, officials of the United States negligently denied Mr. Ng due process throughout his detention. He received his right to a review for purposes of documenting the appropriateness of continuing his detention. See Second Am. Compl. ¶229.

II. STANDARD OF REVIEW

Defendant United States has moved to dismiss Counts 15 and 16 of the Plaintiff’s Second Amended Complaint for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), and for failure to state a claim, pursuant to Rule 12(b)(6).

On a motion to dismiss pursuant to Federal Rule of Civil Procedure, Rule 12(b)(1), the plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. As part of its consideration of the merits of a claim for the purposes of determining jurisdiction, the court need not accept a plaintiff’s allegations in the complaint as true, but “is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 891 (3d Cir. 1977). The Mortensen court noted that “[t]he form of the inquiry is flexible though: ‘As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.’” Id. (quoting Gibbs v. Buck, 307 U.S. 66, 71-72, 83 L. Ed. 1111, 59 S. Ct. 725 (1939)).

A motion filed pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss for failure to state a claim has a different standard of review. Upon review of a 12(b)(6) motion, “the Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. The Court may look only to the facts alleged in the complaint and its attachments. A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff.” National Railroad Passenger Corp. v. URS Corp., 528 F. Supp. 2d 525, 529-530 (E.D. Pa. 2007) (internal citations omitted.) Therefore, while it is true that Plaintiff has the burden of establishing subject matter jurisdiction, once that is established, the sufficiency of her claims must be evaluated in accordance with the liberal 12(b)(6) standard. Because Plaintiff in this case can both establish the jurisdiction of this Honorable Court over the United States and state claims upon which relief can and will be granted, this Court should deny Defendant’s motion.

III. ANALYSIS

A. PLAINTIFF’S CLAIMS ARE BASED ON DIRECT ACTIONABLE ALLEGATIONS AGAINST THE UNITED STATES

Defendant mistakenly reads Plaintiff’s claims against it as seeking a remedy for the negligence of government contractors under a vicarious liability theory. Based on this mistaken belief, Defendant urges this Court to dismiss Plaintiff’s claims on the grounds that this Court lacks subject matter jurisdiction because it has not waived its sovereign immunity and is therefore not subject to suit under the FTCA for the negligence of its contractors.¹ Defendant is mistaken because Plaintiff’s complaint

¹ Defendant fails to mention that its agents “Unknown ICE Official” is sued in the Second Amended Complaint directly and individually under *Bivens* for violating Mr. Ng’s constitutional rights by deliberate indifference to Mr. Ng’s serious medical needs, wrongful detention and imprisonment and infliction of

specifically alleges that United States government employees themselves were negligent and directly violated the duty the United States owed to Mr. Ng. She does not aver that the United States is vicariously liable for the conduct of Wyatt or others.² The United States is not being sued for the negligent acts and omissions of its contractors, but rather for its own alleged negligent acts and omissions. *See National Railroad Passenger Corp.*, 528 F. Supp. 2d at 530-531. Therefore, Defendant's reliance on the independent contractor defense is misplaced and totally irrelevant to this complaint.

“Under the FTCA, the United States is liable to the same extent as a private party for torts of its employees acting within the scope of their employment.” *Miller v. Arpin & Sons, Inc et al.*, 949 F.Supp. 961, 965 (D.R.I. 1997); *See* 28 U.S.C. § 1346(b). Plaintiff has sufficiently alleged in her Complaint that United States government employees acting within the scope of their employment acted negligently in their treatment of Mr. Ng. In light of these pointed allegations, set forth briefly below, this Court has jurisdiction to hear her claims.

In her Complaint, Plaintiff has leveled the following claims against the United States for careless and negligent acts committed directly by employees of the United States against Mr. Ng:³

- Failing to conduct a custody review despite federal regulations that require ICE to conduct a custody review within 120 days to determine whether to

cruel and unusual punishment. (Counts Four, Seven, and Eight of the Complaint). Those counts and that claim are not subject to this motion to dismiss.

² Plaintiff will dismiss Count Sixteen of the Complaint that does allege vicarious liability of the United States for the actions of Wyatt. Defendant is incorrect, however, that the allegations in Count Fifteen are vicarious in nature.

³ In light of documents recently produced by the United States to Plaintiff, Plaintiff will dismiss her allegations in Count Fifteen of a lack of notice with regard to the service of Mr. Ng's deportation. *See* Second Am. Compl. ¶229 (a)-(b).

release or continue to detain a person, or refer them to the Post-Order Detention Unit (8 C.F.R. §241.4(c)), Second Am. Compl. ¶229 (c);

- ICE officials ordered Mr. Ng to be transported to Hartford, Connecticut on July 30, 2008 when they knew or should have known the transport would cause Mr. Ng excruciating pain and suffering, Second Am. Compl. ¶229 (d);
- Failing to ensure his proper treatment during his transportation to and from Hartford, CT on July 30, 2008, Second Am. Compl. ¶229 (e);
- In complete dereliction of their duty, with full knowledge of Mr. Ng's serious condition, the United States government employees in Hartford failed to get him medical care and ordered him back to Wyatt, the place where he was being neglected and abused, Second Am. Compl. ¶229(d)-(e);
- Failing to properly supervise and monitor the actions of those who detained Mr. Ng under its authority, Second Am. Compl. ¶229 (f);
- Despite actual notice of the inadequate medical care, the United States failed to ensure adequate medical care to Mr. Ng during his federal detention and acted with deliberate indifference to Mr. Ng's medical condition, Second Am. Compl. ¶229 (g)-(h); and
- Failing to use reasonable care in the establishment of policies and directives for the provision of medical care to immigration detainees including Mr. Ng, Second Am. Compl. ¶229 (i);

- Carelessly and negligently implementing and/or applying the ICE detainee medical care policy such that Mr. Ng's requests for medical treatment, pain medication and basic needs such as access to a wheelchair were denied, Second Am. Compl. ¶229 (j).

These allegations are made directly against the United States, by and through its agents and/or employees and are not directed at contractors or through vicarious liability. Plaintiff's claims "are premised squarely upon acts or omissions of federal employees" and "raise the specter of negligence on the part of federal employees acting within the scope of their employment." Miller, 949 F.Supp. at 966. As such, this Court has subject matter jurisdiction because the United States has waived sovereign immunity for such claims and is subject to liability under the FTCA

B. THE UNITED STATES RECEIVED PROPER NOTICE OF PLAINTIFF'S CLAIMS UNDER THE FTCA

Defendant argues that because it did not receive sufficient notice of certain of Plaintiff's claims in her pre-suit administrative claim, those claims, namely in Count 15 ¶229 (a)-(d) and Count 16 should be dismissed.⁴ According to this court, the law does not require the level of specificity the United States is insisting upon, but advocates for a "flexible approach" to the notice requirement. Plaintiff provided the United States with the facts as she knew them (prior to being able to conduct any discovery) and included information back to the time when her husband was initially detained. Moreover, Defendant does not dispute that it had adequate information to conduct its investigation into Plaintiff's claims. Therefore, the adequacy of pre-suit notice should not sideline Plaintiff's claims and Defendant's motion should be denied.

⁴ See notes 2 and 3.

“The purpose of the administrative claim presentment requirements in Section 2675(b) and the applicable regulations is to give notice to the Government ‘sufficient to allow it to investigate the alleged negligent episode to determine if settlement would be in the best interests of all.’” Corte-Real v. United States, 949 F.2d 484, 486 (1st Cir. 1991) (quoting Lopez v. United States, 758 F.2d 806, 809 (1st Cir. 1985); see also Reilly v. United States, 863 F.2d 149, 172 (1st Cir. 1988). The First Circuit has emphasized that its view of this requirement is lenient - “the requirements of Section 2675(b) were not intended to put up a barrier of technicalities to defeat [the] claims [of individuals wishing to sue the Government].” Id.; Santiago-Ramirez v. Secretary of Dep't of Defense, 984 F.2d 16, 19 (1st Cir. 1993); see also GAF Corp. v. United States, 818 F.2d 901, 917 (D.C. Cir 1987) (“in revising the procedures for filing claims, Congress manifested no interest whatsoever in restricting claimants' rights under the Federal Tort Claims Act or in restricting their access to the courts”); Erleben v. United States, 668 F.2d 268, 273 (7th Cir. 1981) (“the Federal Tort Claims Act is intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits”).

Indeed, the Senate Report to the 1966 Amendments to the FTCA, which added Section 2675, makes clear that the focus of the pre-suit notice is on enabling an investigation and facilitating settlement negotiations. Significantly, it stated that “the revised procedure was intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States.” S. Rep. No. 1327, 89th Cong., 2d Sess. 1-3 (1966)

reprinted in 1966 U.S.C.C.A.N. 2515, 2516. Therefore, pre-suit notice need only contain information to facilitate fact-finding and the government's decision about whether it deems settlement is appropriate.

“In the context of section 2675, the emphasis is on the agency's receipt of information: it must have enough information that it may reasonably begin an investigation of the claim. ‘Our decision in *Corte-Real* supports saving a claim that is flawed, when the government's investigatory needs are satisfied.’”

Santiago-Ramirez, 984 F.2d at 19 (quoting Kokaras v. United States, No. 92-1616, slip op. (1st Cir. Nov. 23, 1992)). In order to satisfy the notice requirement of section 2675, a plaintiff must provide a Standard Form 95 claim form or other written notification including sufficient information for the government agency involved to investigate the claims and a sum certain of damages sought pursuant to the claims. Lopez, 758 F.2d at 809-10. The First Circuit had noted that “[a] flexible approach to the notice requirement is in keeping with the original purpose behind the filing of an administrative claim: that of allowing the efficient investigation of a claim by the agency without sacrificing the entitlement of a claimant to his or her cause of action against the government. This approach to the notice requirement recognizes that Congress intended to leave the ultimate choice between settlement and suit in the hands of the claimant.” Id.

In this case, Plaintiff filed her pre-suit notice in January 2009, which included the pertinent facts of the case as she knew them to be at the time. (Attached to Defendant's Memo. As Exhibit B). The United States did not in any way respond to the Plaintiff's notice – either by requesting additional information to further investigate her claims or to reject those claims. In its motion, Defendant does not dispute that it received notice and did not respond within the six month period identified by statute. Furthermore,

Defendant did not indicate in any forum (pre or post suit) that it did not have all of the necessary information to perform its investigation of Plaintiff's claims. Therefore, notice is not an issue in this case.

Defendant does, however, contend that the notice that it received was not sufficient enough to put it on notice of certain of Plaintiff's claims – namely, certain of the allegations in Count 15 ¶229. Plaintiff disagrees. Focusing on ¶229 (c) and (d), as Defendant notes, Plaintiff did include an allegation in her administrative claim, which upon investigation, should have triggered a review of his initial custody. That review would have demonstrated that the United States failed in its legal obligation to conduct the 120 day custody review. Next, it is patently absurd to argue that Plaintiff's personal injury claim does not cover Mr. Ng's initial detention and subsequent trip to Hartford – those were the first steps down the road of countless constitutional violations that Mr. Ng endured. The failed custody review and fruitless transport to Hartford led to the harsh treatment and negligence during his detention and the pain and suffering at the time of his death.

In Santiago-Ramirez, the First Circuit discussed whether a plaintiff had provided a government agency with adequate statutory pre-suit notice of his claims. Again, in line with its self-identified lenient view of notice pursuant to an administrative claim, the Court found that notice does not have to be exact. Overturning the district court's finding that the administrative claim was inadequate, the Court held that the plaintiff's letter set forth "the identity of appellant, the date of the incident, the location of the incident, the government agents involved, and the type of injury alleged. It also states the amount of the damages the appellant is requesting. The letter adequately indicated that appellant's

complaint was premised on her emotional distress and mental suffering. The language put the agency on notice that it should investigate the possibility of potential tortious behavior on the part of its agents.” Santiago-Ramirez at 20 (1st Cir. 1993). The First Circuit further recognized that, upon receipt of the plaintiff’s notice, the government agency did not request any further information or clarification of plaintiff’s allegations in holding that the plaintiff’s letter was adequate notice under the statute.

In the case at bar, the plaintiff’s Standard Form 95 and attached narratives provided the Defendant with adequate notice of her claims. It contained the identity of the parties, date and location of the incidents, the types of injuries involved, and a monetary assessment of damages. Significantly, the Defendant never requested any additional or clarifying information regarding the claims and did not identify any perceived or actual ambiguities in the administrative claims. Plaintiff should not be penalized for Defendant’s misinterpretation of the administrative notice. Id.

Three other pieces of information factor into this Court’s consideration of Defendant’s argument regarding notice. First, counsel for Defendant entered her appearance in the case on February 12, 2009, prior to the filing of the FTCA claims, when individual ICE employees were named as defendants. Counselors were in communication about the issues in this case since early this year and all were well aware of the sources of the Plaintiff’s allegations. Second, all parties have been aware of and, in the Defendant’s case involved in, an ICE investigation of the incidents leading to Mr. Ng’s detention and death. That investigation yielded a report that provided a wealth of information about the case. Third, since the administrative notice was sent and the original complaint was filed, new specific facts have come to light through various

investigations. Therefore, Defendant cannot argue that it did not receive effective pre-suit notice of Plaintiff's claims.

The administrative claim constituted sufficient notice such that this Court has jurisdiction to hear all of Plaintiff's claims against Defendant in this case.

C. ALL OF THE FTCA CLAIMS ARE BASED ON RECOGNIZED RHODE ISLAND CAUSES OF ACTION

Defendant argues that Plaintiff's claims against it should also be dismissed under Rule 12(b)(6) for failure to state a claim on the ground that a cause of action against the government under the FTCA must be comparable to an action against a private citizen and "there is no comparable Rhode Island tort for which a private person could be sued." Def's Br. at 9. Because all allegations in Count 15, ¶229 of Plaintiff's complaint sound in general negligence, a well-recognized and well-established tort in Rhode Island jurisprudence, Defendant's argument must fail.

Recalling the standard of review section, because this argument is made under Rule 12(b)(6), this is not a question of subject matter jurisdiction with its more stringent standard. For this argument, this Court "must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. The Court may look only to the facts alleged in the complaint and its attachments. A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff." National Railroad Passenger Corp., 528 F. Supp. 2d at 529-530 (Internal citations omitted.) But, first, a review of the elements of negligence in Rhode Island law is in order.

"Under the FTCA, in determining a defendant's liability, the Court must act 'in accordance with the law of the place where the act or omission occurred.' In order to

prevail on a claim of negligence in Rhode Island, a plaintiff must prove that: (1) the defendant owed the plaintiff a legal duty to refrain from negligent activities; (2) the defendant breached that duty; (3) the breach proximately caused harm to the plaintiff; and (4) there was actual loss or damage resulting. Munsill v. United States, 14 F. Supp. 2d 214, 220 (D.R.I. 1998) (citing Splendorio v. Bilray Demolition Co., Inc., 682 A.2d 461, 467 (R.I. 1996); see also Ferreira v. City of E. Providence, 568 F. Supp. 2d 197, 215 (D.R.I. 2008) (citing Selwyn v. Ward, 879 A.2d 882, 886 (R.I. 2005) (internal quotation marks and citation omitted).)

1. The 120 Day Custody Review

The Plaintiff's complaint alleges that the United States of America, as a governmental entity with jurisdiction and control over ICE and the Department of Homeland Security, and its employees and agents had a duty to conduct itself toward Mr. Ng in ways that would not cause him abuse, medical neglect, and deprivation of his constitutional rights. Second Am. Compl. ¶ 32. By failing to conduct a custody review despite federal regulations that require it to do so within 120 days to determine whether to release or continue to detain a person, or refer them to the Post-Order Detention Unit, Defendant was negligent in failing to honor its duty to Mr. Ng by failing to conduct that review. Second Am. Compl ¶229(c). Perhaps a review of Mr. Ng's detention would have brought pertinent facts to light, but the 120 days passed and the United States did not conduct such a review. Second Am. Compl ¶ 55. That negligence is actionable under Rhode Island common law negligence and therefore, Plaintiff's claim against the United States in this regard should not be dismissed

2. Ordering Transportation to Hartford, Connecticut

Similarly, the United States had a duty to refrain from negligent conduct in ordering Mr. Ng to be transported to Hartford, Connecticut on July 30, 2008 when they knew or should have known the transport would cause Mr. Ng excruciating pain and suffering. Second Am. Compl. ¶229(d). In complete dereliction of their duty, with full knowledge of Mr., Ng's serious condition, the United States government employees in Hartford failed to get him medical care and ordered him back to Wyatt, the place where he was being neglected and abused. Second Am. Compl ¶174. Despite actual notice of the inadequate medical care, the United States failed to provide adequate medical care to Mr. Ng during his federal detention and acted with deliberate indifference to Mr. Ng's medical condition. Second Am. Compl. ¶229(g). Plaintiff also alleges that the United States acted negligently in the establishment of policies and directives for the provision of medical care to immigration detainees including Mr. Ng. Second Am. Compl. ¶229(i). Each of these allegations, especially in the context of the complaint as a whole, demonstrates that Plaintiff has stated a claim against the United States for negligence.

Defendant has presented this Court with no facts or law to dispute Plaintiff's factual allegations in her complaint about her husband's detention, subsequent treatment and death. Moreover, they have failed to establish that the negligence of United States employees as outlined above is not a recognized state cause of action, upon which an FTCA claim can be based. In the light most favorable to Plaintiff, at this stage of the litigation, even the United States cannot argue that she could receive no relief based on these facts and their proof.

IV. CONCLUSION

This Court has subject matter jurisdiction, pursuant to the FTCA, to preside over the Plaintiff's claims against the United States. Sovereign immunity has been waived for these claims and no defense to that waiver applied. Plaintiff has stated a valid claim against the United States for which relief can be granted as is supported by her Second Amended Complaint, despite the fact that discovery is not fully underway. Pursuant to this Court's standard of review on Defendant's motion, this motion should be denied in its entirety.

Dated: November 10, 2009

Respectfully submitted,

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CERTIFICATION

I hereby certify that a copy of the foregoing document was electronically served, to all Counsel of Record on this 10th day of November, 2009.

/s/ John J. McConnell, Jr., Esq.