IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARIA FERNANDA RICO ANDRADE, *Individually and on behalf of the estate of* Gerardo Lozano Rico, *deceased,*	§	
	§	CIVIL ACTION NO.
Plaintiff,	§	
v.	§	2:15-CV-0103
UNITED STATES OF AMERICA, ET AL,	§	
Defendants.	§	

MOTION FOR SUMMARY JUDGMENT

Defendants move for dismissal under Fed. R. Civ. P. 56(c), based on undisputed material facts and established law governing the timely presentation of claims brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq*., and 28 U.S.C. § 1331 pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).[1]

The undisputed material facts are that: (1) the acts or omissions that give rise to plaintiff's claims occurred on November 3, 2011 (Dkt. 1, Complaint, at ¶¶ 25-32), (2) plaintiff filed an administrative claim with the responsible federal agency on June [16], 2014. (Dkt. 1, Complaint, at ¶ 23); and, (3) this lawsuit was filed on February 27, 2015. Because plaintiff has not pled and

1. Plaintiff also asserts jurisdiction under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, however the ATS is a jurisdictional statute *only* for torts committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). ATS does not waive the sovereign immunity of the United States, or create a new cause of action for torts committed in violation of international law. *Id.*, at 713-714; *Hernandez v. U.S.*, 757 F.3d 249, 258-59 (5th Cir. 2014), *aff'd*, 785 F.3d 117, 119 (5th Cir. 2015).

cannot prove a basis for equitable tolling, defendants are entitled to summary judgment as a matter of law on the undisputed facts.

I. NATURE AND STAGE OF PROCEEDINGS

According to the Complaint (Dkt. 1, Complaint, Facts, ¶¶ 25-30), this lawsuit seeks redress for the alleged wrongful death of Gerardo Lozano-Rico ("Lozano"), a Mexican national illegally in the United States. On November 3, 2011, Lozano was traveling in a 1999 Lincoln Navigator near San Patricio County, Texas, when two U.S. Department of Homeland Security, Border Patrol Agents (BPAs), Eberto Cabello and Jose Tejeda initiated a traffic stop based on their belief that the vehicle contained illegal aliens. During the traffic stop, several of the occupants fled, while Lozano climbed into the driver's seat to operate the vehicle. He first backed up to a fence, and then drove forward directly at BPAs Cabello and Tejeda "in order to escape." (Dkt. 1, Complaint, at ¶ 27). Fearing for their safety, the officers discharged their weapons, and Lozano was struck and killed. (Dkt. 1, Complaint, at ¶¶ 25-30).

Plaintiff's Administrative Claim

The Complaint states that an administrative claim was presented to the U.S. Department of Homeland Security on June 11, 2014 (Dkt. 1, Complaint, ¶ 23),[2] for the acts or omissions that occurred on November 3, 2011. *See* Ex. 1, cover letter of June 11, 2014 with enclosure of Standard Form 95, "Claim for Damage, Injury, or Death," signed on 5/13/14. The SF-95 stated the "Date and Day of the Accident" as 11-03-2011. Ex. 1, at SF-95, ¶ 6. At ¶ 8, which calls for

2. The relevant date is June 16, 2014 when DHS received the tort-based claim. 28 C.F.R. § 14.2(a) (Attorney General's regulations governing FTCA administrative claims); *Martinez v. United States*, 728 F.2d 694, 696 n. 3 (5th Cir. 1984) *See* Ex. 3, U.S. Customs and Border Protection denial letter, 8-29-2014, acknowledging receipt of the claim on June 16, 2014.

the factual "BASIS OF CLAIM," the paragraph simply referred DHS to the San Patricio County Sheriff's Office Incident/Offense Report. Within the investigative report is a "Felony Case Report" that states:

> "One of the illegal aliens, who had remained in the vehicle after several others fled, began driving the vehicle in an effort to avoid apprehension and drove towards the border patrol agents. As the vehicle drove towards the Border Patrol Agents, both fired their handguns, resulting in the driver's death."

(Ex. 2, San Patricio County Sheriff's Office, Felony Case Report, 11-08-2011). After consideration, DHS denied the administrative claim on August 29, 2014, because the claim was not timely presented within two years of the alleged act or omission as required under 28 U.S.C. §§ 2401(b), 2675(a). The denial letter was sent via Certified Mail, and plaintiff was advised of her right to file suit in U.S. District Court. *See* Ex. 3, CBP denial letter, 8-29-2014.

Plaintiff's Complaint

This civil action was filed on February 27, 2015. (Dkt. 1, Complaint). Jurisdiction was pled under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq*., 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The Complaint alleges tort and civil rights claims that occurred on November 3, 2011 (Dkt. 1, Complaint, at ¶¶ 25-32). The administrative claim was presented on June 11, 2014 (see Dkt. 1, Complaint, at ¶ 23). This *Bivens* action was filed on February 27, 2015 (Dkt. 1). The Complaint contains no allegations or legal authority to support a waiver of sovereign immunity under the Alien Tort Statute, 28 U.S.C. §1350.

Because this civil action is untimely on its face, the Complaint pled equitable tolling of

the two year statutes of limitation based on an imagined theory of a concealed policy ("Vehicle Policy"), that supposedly instructed or trained Border Patrol officers to risk their lives by intentionally jumping into the path of a fast moving vehicle in order to justify their use of deadly force against the driver. (Dkt. 1, Complaint, ¶¶ 32 -36). Plaintiff has no evidence to support such a nonsensical theory, and the Complaint does not explain how this policy prevented plaintiff from diligently investigating her claims, consulting with counsel, and filing a timely administrative claim or civil action within two years of November 3, 2011.

II. ISSUE FOR DETERMINATION

Whether this action should be dismissed under Fed. R. Civ. P. 56(c), based on undisputed material facts and established law governing the timely presentation of FTCA and *Bivens* claims.

III. SUMMARY OF ARGUMENT

Defendants are entitled to summary judgment under Rule 56(c). The undisputed material facts prove that the causes of action accrued on November 3, 2011, the day that Lozano was shot and killed. Plaintiff presented an untimely administrative claim to DHS on June 16, 2014 in violation of 28 U.S.C. § 2401(b). She also waited more than two years to bring a *Bivens* action. Plaintiff cannot meet her burden of proving extraordinary circumstances to justify equitable tolling.

IV. LAW AND ARGUMENT

A. STANDARD – Rule 56(c). Summary judgment under Rule 56(c) is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*,

477 U.S. 317, 322-23 (1986). When the moving party has carried its burden, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co.*, 475 U.S. at 588. If the dispositive issue is one for which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. *Celotex, supra*, 477 U.S. at 317, 322. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue of fact exists for trial. *Celotex*, 477 U.S. at 324.

B. FEDERAL TORT CLAIMS ACT

"It is elementary that the United States, as sovereign, is immune from suits save as it consents to be sued . . . and [that] the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Farmer v. United States*, 539 Fed. Appx. 584, 585 (5th Cir. 2013), citing *Broussard v. United States*, 989 F.2d 171, 174 (5th Cir. 1993). "The FTCA acts as a limited waiver of sovereign immunity allowing the United States to be sued for the negligent or wrongful acts or omissions of its employees while acting within the scope of their duties. 28 U.S.C. §§ 1346(b), 2671 *et seq.*; *F.D.I.C. v. Meyer*, 510 U.S. 471, 477-78 (1994); *McGuire v. Turnbo*, 137 F.3d 321, 324 (5th Cir. 1998); *Houston v. U.S. Postal Service*, 823 F.2d 896, 902-04 (5th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). The United States is the only

proper defendant in suits brought under the FTCA, and the remedy is exclusive of any other civil action or proceeding. 28 U.S.C. § 2679(b)(1). *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 287 (5th Cir. 2012). Federal agencies and employees may not be sued in their own names. *Vernell v. U.S. Postal Serv.*, 819 F.2d 108, 109 (5th Cir. 1987); *Atorie Air v. F.A.A.*, 942 F.2d 954, 957 (5th Cir. 1991). In fashioning limited waivers of immunity, Congress may impose such conditions as it chooses and the circumstances of the waiver must by strictly construed. *McLaurin v. United States*, 392 F.3d 774, 782 n. 34 (5th Cir. 2004). By claiming jurisdiction under the FTCA, plaintiff is bound by the requirement of filing a timely administrative claim. *McNeil v. U.S.*, 508 U.S. 106, 113 (1993); *Izen v. Catalina*, 398 F.3d 363, 367 (5th Cir. 2005). 28 U.S.C. § 2401(b) sets forth the applicable statute of limitations for filing an administrative claim prior to initiating an FTCA action. It provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b); *Ramming v. United* States, 281 F.3d 158, 165 (5th Cir. 2001). The general rule is that a cause of action accrues at the time of injury. *United States v. Kubrick*, 444 U.S. 111, 120 (1979). It is unnecessary that the potential plaintiff may suspect negligence before the limitations period begins to run. *Id*., at 124. "A cause of action accrues under federal law 'when the plaintiff knows or has reason to know of the injury which is the basis of the action'" and such knowledge encompasses both "(1) the existence of the injury; and (2) the connection between the injury and the defendant's actions. *Nationsbank, supra*, 188 F.3d 589-590. Actual knowledge is not necessary for the limitations period to commence, "if the circumstances would lead a

reasonable person to investigate further. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995). The potential plaintiff bears the affirmative duty to "proceed with a reasonable investigation in response to an adverse event. *Ramming*, 281 F.3d at 163. "A plaintiff …armed with the facts about the harm … can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute which is to require the reasonably diligent presentation of tort claims against the Government." *Kubrick*, 444 U.S. at 123. The requirement of the presentment of administrative claims is intended to ease court congestion and avoid unnecessary litigation by making it possible for the Government to expedite fair settlement of tort claims asserted against the United States. *Frantz v. United States*, 29 F.3d 222, 224 (5th Cir. 1994).

C. BIVENS ACTIONS

28 U.S.C. § 1331 provides a basis for federal subject matter jurisdiction in cases against individual federal employees who violate a person's civil or constitutional rights under the rationale of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* provides a cause of action against employees only in their *individual capacities* for constitutional violations, and requires a showing of actual personal involvement in the alleged violation. *Affiliated Prof'l Home Heath Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999). *Bivens* does not permit a claim against the United States, its agencies, or employees (including supervisors) in their *official capacities* which are treated as actions against the United States. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 71-72 (2001); *Williamson v. U.S. Dep't of Agric.*, 815 F.2d 368, 380 (5th Cir. 1987). Because Congress has not established a

statute of limitations for *Bivens* actions, "[a] *Bivens* action is controlled by the applicable state statute of limitations." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 590 (5th Cir. 1999); *Alford v. United States*, 693 F.2d 498, 499 (1982). Here, Texas' two year statute of limitations for personal injury actions is applicable to this action. *See* Tex. Civ. Prac. & Rem. Code § 16.003(b).

D. EQUITABLE TOLLING

In *United States v. Kwai Fun Wong*, 135 S.Ct. 1625, 1638 (2015), the FTCA's time limits were held "non-jurisdictional" and thus subject to equitable tolling. However, equitable tolling is a narrow remedy "to be applied 'sparingly.'" *Granger v. Arron, Inc.*, 636 F.3d 708, 712 (5th Cir. 2011). The claimant bears the burden of justifying its use. *Trinity Marine Prods. v. United States*, 812 F.3d 481, 486 (5th Cir. 2016). Equitable tolling should not be granted when a plaintiff fails to show that he pursued his remedy with due diligence and cannot prove that the defendant prevented him from filing his action. *Wilson v. Penitentiary Leavenworth*, 450 Fed. App. 397, 399 (5th Cir. 2011). Nor is equitable tolling warranted when there is no suggestion that the plaintiff was induced or tricked in allowing the deadline to pass, nor any evidence of other extraordinary circumstances. *Carter v. McHugh*, 869 F.Supp.2d 784, 790-92 (W.D. Tex. 2012). "A plaintiff who does not act diligently in pursing his or her claim cannot rely on theories of equity to save that claim." *Galindo v. U.S. Dept. of Justice*, 153 Fed. Appx. 333, 334 (5th Cir. 2005), quoting *Wilson v. Sec'y of Dept. of Veterans Affairs*, 65 F.3d 402, 404-405 (5th Cir. 1995). "[T]he principals of equitable tolling . . . do not extend to what is best a garden variety claim of excusable neglect." *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999).

E. ARGUMENT

Plaintiff's pleadings and the attached evidence show that the causes of action accrued on November 3, 2011, the day that Lozano was shot and killed. From the date of injury, plaintiff had two years to investigate, seek professional advice, and file an administrative claim with the Department of Homeland Security and/or pursue a *Bivens* action in federal court. The undisputed material facts are that plaintiff waited well beyond two years to consult with a lawyer (Ex. 4, excerpts from Attorney Employment Contract, 3-16-2014) and then several additional months until June [16], 2014 to file an administrative claim. (Dkt. 1, Complaint, ¶ 23) and Ex. 3, CBP denial letter, 8-29-2014. With respect to her *Bivens* lawsuit, this civil action was untimely filed by several years.

In order to avoid dismissal, plaintiff has pled and may argue equitable tolling based on an imagined theory of a concealed "Vehicle Policy" that supposedly instructed or trained Border Patrol officers to risk their lives by jumping into the path of a fast moving vehicle in order to justify their use of force against the driver. (Dkt. 1, Complaint, ¶¶ 32 -36). Plaintiff, of course, has no evidence to support such a nonsensical theory, and cannot explain how this imagined policy prevented her from filing a timely administrative tort claim or a *Bivens* action.

It should be clear that plaintiff did not exercise diligence in pursuing her claims, and the defendants in no way prevented plaintiff from investigating, consulting an attorney, or filing a timely claim or lawsuit within two years of November 3, 2011. *Wilson v. Penitentiary Leavenworth*, 450 Fed. App. 397, 399 (5th Cir. 2011). "[T]he accrual date is not postponed until the injured party knows every fact [or legal theory] necessary to bring his action." *Zeleznik v. United States*, 770 F.2d 20,23 (3rd Cir. 1985). And, the accrual date should not be suspended

based on an imagined theory that originated after counsel was hired on Mar. 16, 2014. (Ex. 4). Plaintiff cannot meet her burden of showing that equitable tolling should apply. *Trinity Marine Prods. v. United States*, 812 F.3d 481, 486 (5th Cir. 2016).

V. CONCLUSION

WHEREFORE, based on the undisputed material facts and established law, this action should be dismissed under Rule 56(c) because plaintiff failed to present her claims in a timely manner in compliance with the applicable statutes of limitation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was electronically served through the court's electronic filing system, or by U.S. Mail postage prepaid, on this 27th day of March, 2017, to all counsel of record.

/s/ Fred T. Hinrichs
Assistant U.S. Attorney