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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALTON JONES,

Plaintiff,

v.

U.S. BORDER PATROL AGENT GERARDO HERNANDEZ, et al.,

Defendants.

UNITED STATES OF AMERICA,

Counter-Claimant,

v.

ALTON JONES,

Counter-Defendant.

Case No. 16cv1986 W (WVG)

DATE: March 5, 2018
The Hon. Thomas J. Whelan

THE UNITED STATES' RESPONSE IN OPPOSITION TO COUNTER-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[No oral argument pursuant to L.R. 7.d.1.]

I

INTRODUCTION

The United States' counterclaim is not time-barred, because longstanding California law provides that Jones' filing of the original complaint tolled the limitations period as to claims arising from the same event. There is no dispute that Agent Johnson's tort claims against Jones, which he assigned to the United States, are state-law claims arising from the same event that Jones complains of. Agent Johnson's claims had therefore not expired when he assigned them to the United States, and as Jones concedes, the United States then filed the claims as a timely counterclaim within the federal three-year limitations period.

The nature of the claim determines whether federal or state tolling law applies, and Jones himself observes that the United States' tort claims are "a creature of state law." But Jones does not mention California's tolling law and engages in a misleading analysis to reach his objective of having this Court apply the only shred of law that might support a dismissal of the counterclaim, namely the *minority* view of federal common law on the tolling of federal-law counterclaims. To reach his objective, Jones entirely ignores California tolling law, and he makes the legally impossible argument that the state-law claims assigned to the United States became federal-law claims when the United States invoked this Court's federal-question jurisdiction. A court examines the nature of the claims to determine whether it has subject matter jurisdiction, not the other way around. This Court is empowered to adjudicate state-law counterclaims under all of the three bases of subject matter jurisdiction invoked by the United States.

Apart from the fact that Jones does not mention California's tolling law, which clearly applies, and apart from the lack of any basis for applying federal tolling common law to the United States' state-law counterclaim, Jones does not inform this Court that he seeks application of the minority view of federal tolling common law. He also does not mention the majority view, even though several courts in the Ninth Circuit have applied it. The majority view of federal tolling common law, like California's rule, holds that the filing of a complaint tolls the limitations period governing compulsory counterclaims.

II

STATEMENT OF FACTS

The pertinent facts are substantially as set forth by Jones. [ECF Doc. 82 at 1-3.] On August 8, 2016, Jones brought money damages claims against U.S. Border Patrol Agent Jodan Johnson and four other agents, alleging that, on the afternoon of August 9, 2014, on the federally-owned All-Weather Road near the U.S.-Mexico border, Agent Johnson and three other agents maliciously attacked him and "pummeled" him to the ground. [ECF Doc. 1, paras. 30-31; *see also* ECF Doc. 38, paras. 34-35.] On April 9, 2017, the United States filed its timely counterclaim, which arises from the same event. [ECF Doc. 18, paras, 41-55.] The counterclaim alleges that Agent Johnson and three other agents were trying to remove Jones from the All-Weather Road, that Jones refused to leave, and that, when he was surrounded by the four agents, Jones charged toward Agent Johnson, knocking him to the ground, putting him in the hospital and so severely injuring him that he needed surgery and was incapacitated for a year. [*See* ECF Doc. 19, paras. 8, 13-33.] The United States' counterclaim against Jones is for California tort claims only.

III

ARGUMENT

A. ON AUGUST 8, 2016, JONES TOLLED CALIFORNIA'S TWO-YEAR LIMITATIONS PERIOD BY COMMENCING THIS CASE

As Jones points out, California's two-year limitations period applies to the tort claims that Agent Johnson assigned to the United States, because they are "a creature of state law." [ECF Doc. 82 at 4:4-6.] But then Jones fails to mention California's well-settled tolling law:

> It has consistently been held that the commencement of an action tolls the statute of limitations as to a defendant's then unbarred cause of action against the plaintiff, "relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought…"

Trindade v. Superior Court, 106 Cal. Rptr. 48, 49–50 (Ct. App. 1973). *See also Trotter v. Int'l Longshoremen's & Warehousemen's Union, Local 13*, 704 F.2d 1141, 1143 (9th Cir. 1983) (Under California law, a "statute of limitations is suspended or tolled as to a defendant's then unbarred causes of action against the plaintiff arising out of the same

transaction by the filing of the plaintiff's complaint.") (quoting *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.*, 176 Cal. Rptr. 239, 245 (1981)); *North County Communications Corporation v. Sprint Communications Company, L.P.*, 691 F. App'x 466, 467 (9th Cir. May 26, 2017) ("We thus reverse the district court's application of the statute of limitations and remand for it to calculate the limitations period based on the date of the filing of the complaint") (hereinafter referred to as the *Sprint* case) (citing *Trindade, supra*); *Chavez v. City of Hayward*, No. 14cv470-DMR, 2015 WL 3562166, at *4 (N.D. Cal. June 8, 2015) (citing *Trindade, supra*); *Turtle v. Castle Records Inc.*, No. 03-3922-MMC, 2005 WL 1159419, at *1 (N.D. Cal. May 17, 2005); *Luna Records Corp., Inc. v. Alvarado*, 283 Cal. Rptr. 865, 867-68 (Ct. App. 1991) (citing *Perkins v. W. Coast Lumber Co.*, 52 P. 118, 118 (Cal. 1898)).

Because Jones does not mention California's tolling law, he does not explain what legal basis there is for this Court to ignore it. *See Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 530 (9th Cir.), *certified question answered*, 227 Ariz. 121, 254 P.3d 360 (2011) ("Federal courts must abide by a state's tolling rules, which are integrally related to statutes of limitations."); *Sprint*, 691 F. App'x at 467 ("the district court should have applied California law's four-year statute of limitations rather than the Communications Act's two-year statute of limitations.") (reversing in part Judge Bencivengo's decision in No. 09cv2685-CAB-JLB, 2015 WL 12670420 (S.D. Cal. Sept. 11, 2015), and directing the district court to apply California's tolling law) (citing *Trindade, supra*).

Jones filed his original complaint on August 8, 2016, which was one day before the end of California's two-year limitations period, thereby tolling the period as to Agent Johnson's claims arising from the same event that is the basis of Jones' claims. Jones does not dispute that Agent Johnson's tort claims against him arise from the same event. [*See* ECF Doc. 82 at 8:11-25.] There is therefore no factual or legal basis for Jones' argument that "Agent Johnson's tort claims against Mr. Jones . . . expired in August 2016." [ECF Doc. 82 at 5:1-2; *see also* pp. 3-6.]

Agent Johnson's tort claims were therefore still actionable when he assigned them to the United States on March 23, 2017, and as Jones notes, the United States received by assignment whatever rights Agent Johnson had at the time of assignment. [ECF Doc. 82 at 4:10-11 ("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.") (quoting *Boeing Airplane Co. v. Perry*, 322 F.2d 589, 591 (10th Cir. 1963)).]

It is also not disputed that the United States thereafter filed the claims as a timely counterclaim within the federal three-year limitations period, *see* 28 U.S.C. § 2415(b), which applies to claims for money damages brought by the United States. [ECF Doc. 82 at 6:14-28.]

Based on the application of California's tolling law, which Jones leaves out of his analysis, the United States' state-law counterclaim is therefore not time-barred, and this Court need not reach the other issues that Jones raises. His arguments are nonetheless addressed below.

B. FEDERAL COMMON LAW ON TOLLING DOES NOT APPLY BECAUSE THE COUNTERCLAIM IS NOT FOR VIOLATIONS OF FEDERAL LAW

Jones argues that federal common law on tolling applied as of the day the United States filed its counterclaim on April 7, 2017, because it invoked federal question jurisdiction. [ECF Doc. 82 at 7:4-6.] Since, as explained above, the limitations period governing Agent Johnson's claims was tolled on August 8, 2016, Jones needs to explain how that tolling event can be extinguished by the subsequent filing of a counterclaim as to those same claims. Putting aside that logical and legal impossibility, however, it is fundamental that the nature of a claim determines whether a federal court has subject matter jurisdiction, not the other way around. Federal courts are empowered to adjudicate state-law counterclaims under all three of the bases of subject matter jurisdiction invoked by the United States. [ECF Doc. 19, para. 6 (28 U.S.C. §§ 1331 (federal question), 1345 (U.S. as plaintiff), 1367 (supplemental)).] *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, 6 FED. PRAC. & PROC. CIV. § 1419, at 179 (2010) ("courts often apply

state limitations law in federal-question cases when no contrary federal statute or policy is involved"); *United States v. State of Cal*., 655 F.2d 914, 918 (9th Cir. 1980) ("a state statute which provides a time limitation as an element of a cause of action or as a condition precedent to liability applies to suits by the United States [under 28 U.S.C. § 1345] even if there is an otherwise applicable federal statute of limitations"); *Robert Half Int'l Inc. v. Murray*, No. 07cv799-LJO-SMS, 2008 WL 2610793, at *8 (E.D. Cal. June 24, 2008) ("when a court has supplemental jurisdiction over state-law claims, the state statute of limitations and related principles of tolling or relation back apply."); *Walker v. THI of New Mexico at Hobbs Ctr*., 803 F. Supp. 2d 1287, 1299 (D.N.M. 2011) ("Before Congress enacted 28 U.S.C. § 1367, courts found that compulsory counterclaims were within the court's supplemental jurisdiction and [did] not require an independent basis of subject matter jurisdiction.").

Furthermore, the nature of the claim determines whether state or federal tolling law applies, and Jones concedes that the United States was assigned state-law claims. Indeed, all of the decisions that he cites in support of applying federal tolling common law involved counterclaims for violations of federal law.[1] *See N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182 (5th Cir. 2015) (counterclaim for violations of Employee Retirement Income Security Act ("ERISA")); *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc*., No. CV 14-3053-MWF-VBKx, 2015 WL 12778355 (C.D. Cal. Oct. 23, 2015) (counterclaim for violations of ERISA); *Allegro Corp. v. Only New Age Music, Inc*., No. 01-790-HU, 2002 WL 32806161 (D. Or. Oct. 4, 2002) (counterclaims for copyright infringement and violation of the Lanham Act); *Perkins v. Napieralski*, No. CV 01-354-BR, 2001 WL 34047105 (D. Or. Aug. 9, 2001) (counterclaim for violation of 18 U.S.C. § 2511); *40235 Washington St. Corp. v. Lusardi*, No. Civ. 90-1472-R, 1999 WL 33633157 (S.D. Cal. Jan. 19, 1999) (counterclaim for violation of a bankruptcy stay).[2]

[1] Some of the decisions cited by Jones involved federal common law as it applies to recoupment counterclaims, and still others did not involve a counterclaim, and are therefore not relevant to this case, which involves a compulsory counterclaim.

[2] *See also* the cases cited in section III.C. (majority view of federal tolling common law), *infra*.

Conversely, federal courts in the Ninth Circuit consistently apply California's tolling law to state-law counterclaims. *See Sprint*, 691 F. App'x at 467 (counterclaims "arose under state law") (citing *Trindade, supra*); *Varrasso v. Barksdale*, No. 13cv1982-BAS-JLB, 2016 WL 1323228, at *1, 6 (S.D. Cal. Apr. 5, 2016) ("state law" counterclaims) (citing *Trindade, supra*); *Heartland Payment Sys., Inc. v. Mercury Payment Sys., LLC*, No. C 14-0437-CW, 2016 WL 304764, at *8 (N.D. Cal. Jan. 26, 2016) (counterclaim for defamation) (citing *Sidney v. Superior Court, v. Superior Court*, 244 Cal. Rptr. 31, 34 (1988)); *Chavez v. City of Hayward*, 2015 WL 3562166, at *1, 4 (N.D. Cal. June 8, 2015) ("counterclaims for quantum meruit and violation of California's Bane Act") (citing *Trindade, supra*); *Antelope Valley Allied Arts Ass'n v. Lancaster Redevelopment Agency*, No. CV 10-10039-DSF-FMOx, 2011 WL 13217982, at *2 n.2 (C.D. Cal. Nov. 8, 2011) (state-law counterclaims) ("whether an amended pleading relates back to the original pleading…is governed by federal law, [and] whether an amendment to a complaint against an agency relates back to the original complaint against the agency for the purposes of determining when the Tort Claims Act statute of limitations begins…is governed by California law.") (citing *Trindade, supra*); *Robert Half Int'l Inc. v. Murray*, 2008 WL 2610793, at *8 (E.D. Cal. June 24, 2008) (various state-law counterclaims) (citing *Trindade, supra*); *Memry Corp. v. Kentucky Oil Tech., N.V.*, No. C-04-03843-RMW, 2007 WL 2746736, at *7 (N.D. Cal. Sept. 20, 2007) (counterclaim for misappropriation of trade secrets under Cal. Civ. Code § 3426 *et seq*.)) (citing *Sidney, supra*); *Lockheed Martin Corp. v. RFI Supply, Inc*., No. C 00-20002 JF (PVT), 2006 WL 1525719, at *1 (N.D. Cal. May 30, 2006) (counterclaim for violation of California Business and Professions Code) (citing *Sidney, supra*); *Turtle v. Castle Records Inc*., 2005 WL 1159419, at *1 (N.D. Cal. May 17, 2005) ("Counterclaims, all of which arise under state law") (citing *Trindade, supra*); *Burger v. Kuimelis*, 325 F. Supp. 2d 1026, 1045 (N.D. Cal. 2004) (counterclaim for violation of California Unfair Practices Act) ("Under *Sidney*, [*supra*,] the commencement of an action by a plaintiff tolls the statute of limitations for any counterclaims that 'arise out of the same occurrence' as the allegations of the complaint.").

This Court should therefore reject Jones' unfounded argument that federal tolling common law applies in this case. Even if it did apply, though, Jones cites only the minority view, which is discussed next. The majority view, like California's rule, is that the original filing of a complaint tolls the limitations period governing compulsory counterclaims. Again, Jones does not dispute that the United States' counterclaim is compulsory. [ECF Doc. 82 at 8:11-25.] *See* Fed. R. Civ. 13 (a)(1)(A) (defined as a claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"); *Pochiro v. Prudential Ins. Co. of Amer*., 827 F.2d 1246, 1249 (9th Cir. 1987) (the court "analyze[s] whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.").

C. EVEN IF FEDERAL TOLLING COMMON LAW APPLIED, THE MAJORITY VIEW IS THE SAME AS CALIFORNIA'S TOLLING LAW

Leaving out any mention of California's tolling law, and without supplying a basis for applying federal tolling common law, Jones then cites only the minority view of federal common law to support his argument that the filing of his original complaint did not toll California's two-year limitations period as to Agent Johnson's tort claims arising from the same event. [ECF Doc. 82 at 8:11-25.] It appears that the Fifth Circuit is the only circuit to adopt the minority view. *See North Cypress Medical Center Operating Co., Ltd. v. Cigna Healthcare*, *supra*.[3]

Jones does not mention the majority view or any cases that refer to it. The majority view holds that "the institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim." CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, 6 FED. PRAC. & PROC. CIV. § 1419, at 179 (2010). The majority view has been applied in the Federal, Fourth, and Ninth Circuits. *See Employers Ins. of Wausau v. United States*, 764 F.2d 1572, 1576 (Fed. Cir. 1985) (federal government

[3] Again, the minority-view cases cited by Plaintiff, and the majority-view cases cited below, concerned counterclaims for violations of federal law. The United States' counterclaim contains only state-law claims, so California's tolling provision applies.

contract case); *Kirkpatrick v. Lenoir County Board of Education*, 216 F.3d 380, 387 (4th Cir. 2000) (Individuals with Disabilities Education Act ("IDEA") case); *Burlington Industries v. Milliken & Co.*, 690 F.2d 380, 389 (4th Cir. 1982) (antitrust case); *Sprint*, 691 F. App'x at 468 (9th Cir. 2017) (dictum). *See also Hartford v. Gibbons & Reed Co*., 617 F.2d 567, 570 (10th Cir. 1980) (dictum) (noting that "a majority of courts have held that where a plaintiff institutes an action in a timely manner, the running of the statute of limitation governing the compulsory counterclaim is tolled, provided the counterclaim was not time-barred at the commencement of the plaintiff's action"); *Canned Foods, Inc. v. United States*, 140 F. Supp. 771, 772 (Ct. Cl. 1956) ("We adopt the view that the statute is tolled") (discusses the "conflict in the decisions" at the time) (counterclaim for violation of False Claims Act).

Although the Ninth Circuit has not yet ruled on this issue in a reported decision, one panel recently acknowledged in dictum the majority view. *See Sprint*, 691 F. App'x at 468 (citing the Fourth Circuit's decision in *Burlington Indus. v. Milliken & Co*., 690 F.2d at 389 ("the better view holds that 'the institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim.'")). *See also Mattel, Inc. v. MGA Entm't, Inc.*, No. CV 04-9059-DOC-RNBx, 2013 WL 12122577, at *2 (C.D. Cal. Dec. 17, 2013) (copyright infringement case) (citing *Religious Tech. Ctr. v. Scott*, 82 F.3d 423 (unpublished table decision), 1996 WL 171443, at *8 (9th Cir. 1996), *as amended on denial of reh'g* (July 5, 1996) (dictum)).[4] In addition, several district courts in the Ninth Circuit have applied the majority view.

In 2007, the U.S. District Court for the District of Nevada noted that "the majority of courts to address the issue have concluded that a plaintiff's institution of a suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim." *Yates v. Washoe Cnty. Sch. Dist*., No. 07cv-200-LRH-RJJ, 2007 WL 3256576, at *2 (D. Nev. Oct. 31, 2007) (IDEA case).

[4] Recognizing the application of Ninth Cir. Rule 36-3 (citing unpublished decisions issued before January 1, 2007), there appears to be no restriction on noting that the district court's 2013 decision relied on the Ninth Circuit's 1996 unpublished decision.

In 2010, Judge Benitez of this district found the majority view to be "persuasive," ruling that "a compulsory counterclaim is timely if the underlying complaint is filed within the applicable limitations period and the compulsory counterclaim is filed within the applicable response deadline to that complaint." *N. Cty. Commc'ns Corp. v. Verizon Glob. Networks, Inc*., 685 F. Supp. 2d 1112, 1119 (S.D. Cal. 2010) (counterclaim for violation of FCC regulations).

In 2011, the U.S. District Court for the Central District ruled: "'[A] compulsory counterclaim relates back to the time of the filing of the plaintiff's complaint…'" *Mattel, Inc. v. MGA Entm't, Inc*., 782 F. Supp. 2d 911, 1044 (C.D. Cal. 2011) (quoting *Kirkpatrick, supra*, and citing *Wausau, supra*) (copyright infringement case). *See also* (in the same case) *Mattel, Inc. v. MGA Entm't, Inc.*, 2013 WL 12122577, at *2 (also citing the Ninth Circuit's unpublished 1996 *Scott* decision); *Bryant v. Mattel, Inc*., No. CV 04-9049-DOC-RNBx, 2010 WL 11463865, at *9 (C.D. Cal. Oct. 5, 2010)). *See also Orange County Health Care Agency v. Dodge*, 793 F. Supp. 2d 1121, 1129 (C.D. Cal. 2011) (citing *Yates, supra*; *Kirkpatrick, supra*) (counterclaims for violations of Rehabilitation Act of 1973, Civil Rights Act, and Unruh Act).

In 2012, the U.S. District Court for the Northern District of California held that "compulsory counterclaims relate back to the date of the pleading to which they respond…" *Esilicon Corp. v. Silicon Space Tech. Corp*., No. C-11-06184-EDL, 2012 WL 12920837, at *3 (N.D. Cal. Oct. 3, 2012) (copyright infringement case).

There are district courts in the Ninth Circuit that have followed the minority view, which Jones cites, and which are addressed above in section III.B. [ECF Doc. 82 at 8:11-25.] But, again, this Court need not decide whether to apply the majority or minority view,[5]

[5] In his 2010 decision, Judge Benitez found the majority view to be persuasive because it "further[s] the goal of adjudicating all disputes between the parties in one action and providing complete relief to the defendant who has been brought involuntarily into court." *N. Cty. Commc'ns Corp. v. Verizon Glob. Networks, Inc*., 685 F. Supp. 2d at 1119. It also seems that not allowing tolling would increase the probability of litigation, because (1) it might motivate parties in a two-way dispute, who are otherwise willing to remain reactive, to proactively bring suit to preserve their rights in case the other side decides to sue at the last moment, and (2) it might create an incentive for either party to sue at the last moment, knowing that he or she can do so without the risk of the other party's countersuing.

because the United States' counterclaim does not arise from federal law; it arises from state law, and California's tolling law is dispositive: the filing of the original complaint tolls the statute of limitations for claims that arise from the same event as the claims of the complaint. Jones' motion should therefore be denied.

IV

CONCLUSION

The United States' counterclaim is not time-barred: it arises from California state law, and according to well-settled California tolling law, the filing of Jones' original complaint tolled the two-year limitations period that applied to Agent Johnson's tort claims against Jones. Even if this Court were to apply federal tolling common law, the majority view, acknowledged by the Ninth Circuit in an unreported decision, and followed by many district courts in the Ninth Circuit, is the same as California's tolling rule: the original complaint tolls the statute of limitations governing compulsory counterclaims. This Court should deny Jones' motion for summary judgment.

DATED: February 16, 2018

Respectfully submitted,

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