

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 22-6471

STEVE AUDETTE,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; DR. NOGO; DR. BYRON HERBAL; DR.
ADEIRDRE STRIBLAND-RILEY; P.A. LAVON OVERTON; NURSE LISA
PATTERSON; NURSE CAROLYN CONNOLLY; NURSE ELIZABETH
LOZIUK; NURSE KIMBERLY REID; DR. GURINDER SANDHU; DR. REED;
NURSE NATASHA ASHE; NURSE JUSTINE NIXON; T. NOBLES; NURSE P.
NWABINWE; DR. EMAD WARD; ROGER HILL; CO JOHNSON,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at
Raleigh. Richard E. Myers, II, Chief District Judge. (5:21-ct-03245-M)

Submitted: October 13, 2022

Decided: October 18, 2022

Before NIEMEYER and AGEE, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Steve Audette, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Steve Audette appeals the district court's order dismissing his complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order. *Audette v. United States*, No. 5:21-ct-03245-M (E.D.N.C. Apr. 7, 2022). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: October 18, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6471
(5:21-ct-03245-M)

STEVE AUDETTE

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; DR. NOGO; DR. BYRON HERBAL; DR.
ADEIRDRE STRIBLAND-RILEY; P.A. LAVON OVERTON; NURSE LISA
PATTERSON; NURSE CAROLYN CONNOLLY; NURSE ELIZABETH LOZIUK;
NURSE KIMBERLY REID; DR. GURINDER SANDHU; DR. REED; NURSE
NATASHA ASHE; NURSE JUSTINE NIXON; T. NOBLES; NURSE P.
NWABINWE; DR. EMAD WARD; ROGER HILL; CO JOHNSON

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court
is affirmed.

This judgment shall take effect upon issuance of this court's mandate in
accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: December 20, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6471
(5:21-ct-03245-M)

STEVE AUDETTE

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; DR. NOGO; DR. BYRON HERBAL; DR.
ADEIRDRE STRIBLAND-RILEY; P.A. LAVON OVERTON; NURSE LISA
PATTERSON; NURSE CAROLYN CONNOLLY; NURSE ELIZABETH
LOZIUK; NURSE KIMBERLY REID; DR. GURINDER SANDHU; DR. REED;
NURSE NATASHA ASHE; NURSE JUSTINE NIXON; T. NOBLES; NURSE P.
NWABINWE; DR. EMAD WARD; ROGER HILL; CO JOHNSON

Defendants - Appellees

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Agee, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX A-1

FILED: December 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6471
(5:21-ct-03245-M)

STEVE AUDETTE

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; DR. NOGO; DR. BYRON HERBAL; DR.
ADEIRDRE STRIBLAND-RILEY; P.A. LAVON OVERTON; NURSE LISA
PATTERSON; NURSE CAROLYN CONNOLLY; NURSE ELIZABETH
LOZIUK; NURSE KIMBERLY REID; DR. GURINDER SANDHU; DR. REED;
NURSE NATASHA ASHE; NURSE JUSTINE NIXON; T. NOBLES; NURSE P.
NWABINWE; DR. EMAD WARD; ROGER HILL; CO JOHNSON

Defendants - Appellees

M A N D A T E

The judgment of this court, entered October 18, 2022, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

APPENDIX A-2

FILED: January 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6471
(5:21-ct-03245-M)

STEVE AUDETTE

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; DR. NOGO; DR. BYRON HERBAL; DR.
ADEIRDRE STRIBLAND-RILEY; P.A. LAVON OVERTON; NURSE LISA
PATTERSON; NURSE CAROLYN CONNOLLY; NURSE ELIZABETH
LOZIUK; NURSE KIMBERLY REID; DR. GURINDER SANDHU; DR. REED;
NURSE NATASHA ASHE; NURSE JUSTINE NIXON; T. NOBLES; NURSE P.
NWABINWE; DR. EMAD WARD; ROGER HILL; CO JOHNSON

Defendants - Appellees

O R D E R

The court denies the motion to reconsideration.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

APPENDIX A-3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:21-CT-03245-M

STEVEN AUDETTE,

Plaintiff,

v.

UNITED STATES OF AMERICA, et
al.,

Defendants.

ORDER

On August 18, 2021, Steven Audette (“plaintiff”), a federal inmate proceeding *pro se* and without prepayment of fees, filed a complaint pursuant to Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (“Bivens”), and the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671–80. See [D.E. 1, 2, 5]. Plaintiff later filed what the court construed as a proposed amended complaint, see [D.E. 6], and motions to expedite, to use evidence from prior proceeding before this court, for copies, and to appoint counsel, see [D.E. 9, 10, 12, 13, 15].

As to plaintiff’s request for appointment of counsel, see Mot. [D.E. 15], no right to counsel exists in civil cases absent “exceptional circumstances.” Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984), abrogated in part on other grounds by Mallard v. U.S. Dist. Court, 490 U.S. 296 (1989). “Exceptional circumstances” that contemplate appointment of counsel in *pro se* civil cases arise when a plaintiff lacks capacity to represent himself; this is a determination by the court that “hinges on [the] characteristics of the claim and the litigant.” Whisenant, 739 F.2d at 163.

Because this case is not complex, and because plaintiff has the capacity to proceed *pro se*, he fails to show “exceptional circumstances” meriting appointment of counsel, see id., and the court DENIES this aspect of the motion [D.E. 15].

The court now conducts its initial review of the complaint pursuant to 28 U.S.C. § 1915A.

Legal Standard:

Under 28 U.S.C. § 1915A, the court “shall identify cognizable claims or dismiss the complaint . . . if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief can be granted” or “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b). A frivolous case “lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989).

In Bivens, the Supreme Court “‘recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.’” Iqbal, 556 U.S. at 675 (citation omitted); see Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) (“The purpose of Bivens is to deter individual federal officers from committing constitutional violations.”). To state a cognizable Bivens claim, “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” Iqbal, 556 U.S. at 676; see Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691–92 (1978).

Under the FTCA, the United States waives sovereign immunity for “the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. § 1346(b)(1); see Millbrook v. United States, 569 U.S. 50, 52 (2013). A prisoner can sue under the FTCA to recover damages from the United States for personal injuries sustained during confinement in a federal prison due to the negligence of a government employee. See Millbrook, 569 U.S. at 53; United States v. Muniz, 374 U.S. 150, 153–58 (1963).

Plaintiff’s Complaint:

Plaintiff names as defendants the United States and numerous healthcare professionals and officers at F.M.C. Butner including: Dr. A. Nogo, a physician; Dr. Bryon Herbal, a psychiatrist;

Dr. Adeirdre Stribland-Riley, a psychiatrist; Physician's Assistant ("P.A.") Lavon Overton; Corrections Officer ("C.O.") Johnson; Nurse Lisa Patterson; Nurse Carolyn Connolly; Nurse Elizabeth Loziuk; Nurse Kimberly Reid; Dr. Gurinder Sandhu, a physician; Dr. Reed, a physician; Nurse Natasha Ashe; Nurse Justine Nixon; T. Nobles, a physical therapist; Nurse P. Nwabinwe; Dr. Emad Ward, a physician; Roger Hill, a radiology supervisor; and C.O. Carey. See Compl. [D.E. 1] at 4–9. Plaintiff generally alleges that, between January 27, 2015, and September 30, 2015, he received inadequate medical care at F.M.C. Butner in violation of the Eighth Amendment, "statutory rights violations, and torts [sic]." Id. at 10.

Plaintiff specifically alleges, among other things, that: for two months between February 5 and April 15, 2015, he was denied use of a walker to prevent falls; due to his lack of a walker, on March 27, 2015, plaintiff fell in his cell and broke his neck; on April 24, 2015, the broken neck was diagnosed via an M.R.I. by a neurologist at Duke University; Dr. Riley (presumably Dr. Stribland-Riley) falsely labeled plaintiff as a malingerer; plaintiff fell five more times; the first fall went unrecorded by C.O. Johnson and nurses Patterson, Reid, and Loziuk; "defendants lied, altered records, faked a nonexistent M.R.I. scan, are concealing or have destroyed two MRI scans which shows a broken neck with spinal cord compression at c5-c6"; all defendants falsely recorded plaintiff had a walker, failed to report his statements or his falls, "maliciously" prevented plaintiff from receiving help, and are complicit in falsifying and concealing his medical records; that, while he was suffering from a broken neck, he was begging for one month to be seen by a neurologist; decompressive surgery was delayed four months until July 29, 2015; these delays caused "extensive spinal cord damage and permanent neurological damage"; and defendants, in a coverup, are attempting to conceal his injury. Id. at 10–11. Plaintiff outlines a cross-referencing list of each defendants' purported actions and the dates on which they occurred. See id. at 12–15.

As to his injury, plaintiff describes his medical difficulties arising from the fall on March 27, 2015, and five subsequent falls, including, among other things, permanent spinal cord damage, loss of movement, inability to walk unaided, and general health deterioration. See id. at 16–17.

For relief, plaintiff seeks: “Punishment, compensatory and punitive damages, retribution for what F.M.C. Butner staff did to me, and the inhumane, unethical, immoral, unjust, unconstitutional, reprehensible treatment I received at their hands [sic].” Id. at 18.

After review, the court notes that what it initially construed as a proposed amended complaint essentially is a copy of the complaint. Compare Compl. [D.E. 1], with [D.E. 6].

Discussion:

Plaintiff states the instant action is a re-filing of an earlier case. See Compl. [D.E. 1] at 1 (citing Audette v. United States Government, et al., No. 5:17-ct-03094-FL (E.D.N.C.)); see also Mot. [D.E. 10] (moving to proceed, noting “the current case is exactly the same case as the one inadvertently dismissed without prejudice”); Mot. [D.E. 12] (moving to proceed, reiterating “all facts, evidence, etc. for the current case are the exact same documents etc. that are in the court’s and defense attorney office as submitted for previous inadvertently dismissed civil lawsuit [sic].”); Mot. [D.E. 13] (moving to proceed, stating the instant and earlier cases are “exactly the same.”).

Plaintiff’s earlier case involved Bivens and FTCA claims premised upon, among other things, falls at Butner in 2015 and his resulting broken neck. See Audette, No. 5:17-ct-03094-FL (E.D.N.C. March 23, 2017), Am. Compl. [D.E. 7]. In the earlier case, on October 2, 2017, the court ordered plaintiff to file a particularized complaint. Id., Order [D.E. 20]. On November 27, 2017, plaintiff filed a second amended complaint. Id., 2d Am. Compl. [D.E. 24]. On July 16, 2018, the court: conducted its initial review; allowed to proceed Bivens claims against four defendants in this action—C.O. Johnson, Dr. Nogo, and Nurses Patterson and Reid—but dismissed

the claims against various other defendants; and dismissed without prejudice the FTCA claims for failure to comply with North Carolina Rule of Civil Procedure 9(j). Id., Order [D.E. 31]. On May 9, 2019, plaintiff moved for voluntary dismissal without prejudice. Id., Mot. [D.E. 86]. On July 25, 2019, the court, among other things, granted plaintiff's motion for voluntary dismissal and dismissed the action without prejudice. Id., Order [D.E. 89] (citing Fed. R. Civ. P. 41(a)(1) and noting defendants had filed neither an answer nor a motion for summary judgment). On September 29, 2019, plaintiff moved to reopen the case. Id., Mot. [D.E. 94]. On May 20, 2021, the court, among other things, denied the motion to reopen the case. Id., Order [D.E. 108] (noting plaintiff's motion for voluntary dismissal was self-executing).

First, for the reasons noted by the court in plaintiff's prior action, see id., Order [D.E. 31] at 5–6, the court dismisses the instant FTCA claims because plaintiff again fails to comply with North Carolina Rule of Civil Procedure 9(j) or plausibly allege a claim of *res ipsa loquitur*.

Next, plaintiff's Bivens and state tort-law claims are untimely. Bivens actions are subject to state statutes of limitations for personal injury actions. See Wilson v. Garcia, 471 U.S. 261, 279–80 (1985); Reinbold v. Evers, 187 F.3d 348, 359 n.10 (4th Cir. 1999). North Carolina has a three-year statute of limitations for personal injury actions. See N.C. Gen. Stat. § 1-52(5).

The time for a Bivens cause of action is determined under federal law and generally accrues when plaintiff either knows or has reason to know of the injury that is the basis of the action. See Reinbold, 187 F.3d at 359 n.10 (citations omitted); see also Williams v. Blue Cross Blue Shield of N. Carolina, 357 N.C. 170, 178, 581 S.E.2d 415, 423 (2003) (noting the general rule is that “a cause of action accrues as soon as the right to institute and maintain a suit arises,” but, if the purported violation is the result of “continual unlawful acts,” the “statute of limitations does not begin to run until the violative act ceases.”).

Here, because these claims arose between January 27, 2015, and September 30, 2015, and because plaintiff knew or should have known of his injuries on or about the dates of occurrence, the three-year statute of limitations ran well before plaintiff commenced the instant action.

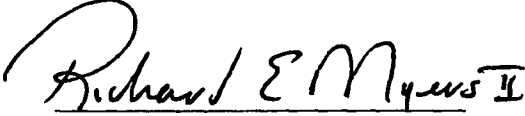
To the extent plaintiff contends that the statute of limitations for these claims was extended by his voluntary dismissal of the earlier complaint premised on these same claims, the instant action remains untimely. Rule 41(a)(1) of the North Carolina Rules of Civil Procedure provides that, when a plaintiff voluntarily dismisses an action, “a new action based on the same claim may be commenced within one year after such dismissal.” N.C. Gen. Stat. § 1A-1, Rule 41(a)(1); see Ballard v. Combis, 759 F. App’x 152, 156 (4th Cir. 2019) (per curiam) (unpublished) (noting that, pursuant to N.C. R. Civ. P. 41(a), “when a plaintiff voluntarily dismisses an action, the plaintiff may file ‘a new action based on the same claim’ if either (a) the statute of limitations governing the claim has not run, or (b) the statute of limitations has run, but it has been less than a year since the voluntary dismissal of the first action.”); see also Watterson v. Millis, No. 5:18-CT-3370-FL, 2020 WL 1429213, at *4 (E.D.N.C. Mar. 19, 2020) (noting the one-year commencement requirement of N.C. R. Civ. P. 41 of applies to the statute of limitations of § 1983 claims and state-law claims); Vaughan v. Mashburn, 371 N.C. 428, 435–36, 817 S.E.2d 370, 375–76 (2018) (discussing the N.C. R. Civ. P. 41(a)(1) “saving provision” for voluntary dismissals).

As noted above, on May 9, 2019, plaintiff moved to voluntarily dismiss his earlier action premised on these claims, Audette, No. 5:17-ct-03094-FL (E.D.N.C.), Mot. [D.E. 86], and, on July 25, 2019, this self-executing motion was granted, and that action was dismissed without prejudice, see id., Order [D.E. 89]. Because plaintiff did not commence the instant action until more than one year after he voluntarily dismissed his earlier action, the “saving provision” of North Carolina Rule of Civil Procedure 41(a)(1) here is unavailable. Cf. Phipps v. Grady, No. 7:15-CV-00103-F,

Conclusion:

For the reasons discussed above, the court: DENIES the motion for copies [D.E. 15]; DENIES the motion to appoint counsel [D.E. 15]; DENIES AS MOOT the motions to expedite and to use evidence from plaintiff's prior proceeding before this court [D.E. 9, 10, 12, 13, 15]; DISMISSES the instant complaint; and DIRECTS the clerk to close the case.

SO ORDERED. This 7th day of April 2022.


RICHARD E. MYERS II
Chief United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**