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E-FILED
CNMI SUPERIOR COURT
E-filed: Dec 11 2014 09:23AM
Clerk Review: N/A
Filing ID: 56454902
Case Number: 14-0051-CV
N/A

By order of the Court, Presiding Judge Roberto C. Naraja

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**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

DWAYNE MOSES CASTRO,)
)
) **Plaintiff,**)
)
) **v.**)
)
) **CNMI'S DEPARTMENT OF PUBLIC**)
) **SAFETY AND JOHN DOES 1 THROUGH**)
) **5,**)
)
) **Defendants.**)

CIVIL ACTION NO. 14-0051

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

INTRODUCTION

THIS MATTER came before the Court for a hearing on April 30, 2014, at 9:00 a.m. in Courtroom 202A on the Commonwealth of the Northern Mariana Islands' Department of Public Safety's ("Defendant") motion to dismiss. Defendant was represented by Assistant Attorney General James M. Zarones. Dwayne Moses Castro ("Plaintiff") was represented by Brien Sers Nicholas, Esq.

Based on review of the filings, oral arguments, and applicable law, the Court hereby GRANTS Defendant's motion to dismiss for the reasons set forth below.

BACKGROUND

Plaintiff alleges that on February 19, 2012, he was violently run over by an unknown motorist. (Compl. ¶¶ 6-7.) After dragging himself to a nearby home, he contacted Defendant

1 who then assigned Plaintiff a DPS case number (DPS Case No. 12-001536). Plaintiff also
2 contacted the Commonwealth Health Center (“CHC”) for assistance. *Id.* at ¶¶ 11-14.

3 On April 18, 2012, approximately two months after the incident, Plaintiff was
4 interviewed by Defendant’s Traffic Investigator, Adrian T. Mendiola (“Mendiola”), about the
5 incident but Defendant has since failed to investigate. This has resulted in Plaintiff’s inability
6 to ascertain the identity of the motorist. *Id.* at ¶¶ 15-17. Plaintiff has sustained injuries to his
7 head, elbow, hip, and left leg and has since had difficulty eating and sleeping properly as a
8 result of the incident. *Id.* at ¶¶ 16 and 20.

9 Defendant then filed this motion to dismiss for lack of subject matter, pursuant to NMI
10 R. Civ. P. 12(b)(1) and for lack of personal jurisdiction, pursuant to NMI R. Civ. P. 12(b)(5).
11 Defendant asserts that Plaintiff has made no representation that the present claim has been
12 presented to the Attorney General’s Office (“AGO”), thus, Plaintiff did not comply with the
13 Government Liability Act (“GLA”) and thereby deprives this Court of subject matter
14 jurisdiction. Defendant also asserts that Plaintiff did not properly serve process upon the
15 government agency, and thus, this Court lacks personal jurisdiction. *Id.*

16 **LEGAL STANDARD**

17 **1. SUBJECT MATTER JURISDICTION**

18 “When ruling on a motion to dismiss for lack of subject matter jurisdiction under Rule
19 12(b)(1), the court must accept as true the complaint’s undisputed factual allegations and
20 construe the facts in the light most favorable to plaintiff.” *Atalig v. Commonwealth Election*
21 *Comm’n*, 2006 MP 1 ¶ 16. “Dismissal is appropriate if the plaintiff has no right to be in a
22 particular court.” *Id.* Regardless of whether a plaintiff has a valid claim, “[i]f the court lacks
23 jurisdiction, it has no power to enter judgment and may only dismiss.” *Id.*

1 absent its permission to be sued.” *Pangelinan v. NMI Retirement Fund*, Civ. No. 04-0578
2 (NMI Super. Ct. Mar. 6, 2006) (Order Granting in Part and Den. in Part Pl.’s and Def.’s Cross-
3 Motions for Summ. J. 6). This principle derives from the Sovereign Immunity Clause of the
4 Eleventh Amendment to the U.S. Constitution. *Id.* Thus, as a general rule the government is
5 immune from most lawsuits¹; however, the government may waive immunity for certain
6 claims, such as the claim in the instant case and other claims that fall within the GLA. *Marine*
7 *Revitalization Corp. & Anthony Pellegrino v. Dep’t of Land and Nat. Resources*, 2010 MP 18

8 ¶ 40. The GLA states in relevant part,

9 An action shall not be instituted upon a claim against the Commonwealth for
10 money damages for injury or loss of property or personal injury..., unless the
11 claimant shall have first presented the claim to the Attorney General and the
12 claim shall have been finally denied by the Attorney General, in writing, and
13 the claimant so notified.

14 7 CMC § 2202(b) (emphasis added).

15 The GLA is modeled after the Federal Torts Claims Act and “closely tracks provisions
16 of the Federal Tort Claims Act [(the “FTCA”).” *See* PL 15-22 § 2; *see also Kabir v. CNMI*
17 *Public School System*, 2009 MP 19, ¶ 40, n.24 (2009) (comparing the GLA with the FTCA).
18 The GLA “require[s] that any person having a claim against the C[NMI] would have to file
19 notice of that claim with the A[GO] prior to bringing suit.” *Id.* The GLA was enacted to save
20 the CNMI the cost of litigation and to allow the AGO to settle valid claims resulting in “greater
21

22 ¹ Although the government enjoys the benefit of sovereign immunity, a plaintiff may bring suit against a
23 government officer if the officer acts pursuant to their statutory power when either the powers themselves or
how they are exercised are constitutionally void. *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962). However,
Plaintiff’s lawsuit does not allege any constitutional violations by the government in his complaint and
therefore this scenario does not apply.

1 net recoveries for deserving plaintiffs . . . in accord[ance] with the federal requirements under
2 the F[TCA].” *Id.*²

3 The FTCA is codified at 28 U.S.C. §§ 2671-2680. The most relevant section for this
4 matter is § 2675(a), and states in part:

5 An action shall not be instituted upon a claim against the United States for
6 money damages for injury . . . caused by the negligent or wrongful act or
7 omission of an employee of the Government while acting within the scope of
8 his office or employment, unless the claimant shall have first presented the
9 claim to the appropriate Federal agency and his claim shall have been finally
10 denied by the agency in writing The failure of an agency to make final
11 disposition of a claim within six months after it is filed shall . . . be deemed a
12 final denial of the claim.

13 Jurisdictional notice requirements are satisfied if claimant “provides a claim form or
14 ‘other written notification’ which includes (1) sufficient information for the agency to
15 investigate the claims, and (2) the amount of damages sought.” *Santiago-Ramirez v. Secretary*
16 *of Dep’t of Defense*, 984 F.2d 16, 19 (1st Cir. 1993). Proper notice to the government agency
17 being sued is essential to a court’s jurisdiction. *Best Bearings Co. v. United States*, 463 F.2d
18 1177, 1179 (7th Cir. 1972). The Seventh Circuit, in *Best Bearings*, found that where
19 “[p]laintiff’s complaint and the accompanying documents fail to establish that the plaintiff
20 pursued the administrative procedure prerequisite to bring the suit . . . ,[t]he district court
21 properly dismissed the claim for plaintiff’s failure to comply with the provision.” *Best*
22 *Bearings*, 436 F.2d at 1179.

23 The policy underlying the GLA is to ease court congestion and to avoid unnecessary
litigation while making it possible for the government to expedite the fair settlement of tort

² Because the GLA is based heavily on the FTCA, this Court turns to federal case law and statutes for guidance. See *Commonwealth v. Crisostomo, et al.*, 2005 MP 9 (2005); *Commonwealth v. Eguia*, 2008 MP 17 ¶ 8 (applying federal case law to the double jeopardy clause); See also *Commonwealth v. Martinez*, 4 NMI 18, 20 (1993) (analyzing the rules of procedure and finding that the CNMI turns to its federal counter parts for guidance); See also *In re Estate of Malite*, 2010 MP 20, ¶ 22 n.22 (2010).

1 claims against the government. *Danowski by Danowski v. U.S.*, 924 F. Supp. 661 (D.N.J.
2 1996).

3 **A. The GLA Governs this Matter**

4 Plaintiff argues that the GLA only protects government employees, not agencies, and
5 therefore an agency can be sued. Plaintiff argues that the Court’s jurisdiction is bestowed by
6 the Constitution and agencies do not have the power to strip this Court of jurisdiction.
7 Plaintiff’s argument asserts there are three categories contemplated by the GLA: the CNMI; a
8 CNMI agency; and a CNMI employee. He asserts he is suing an agency, not an employee or
9 the Commonwealth and therefore the GLA is inapplicable. Plaintiff also raises a separation of
10 powers issue.

11 The Court is not persuaded by these small distinctions drawn by Plaintiff: First, the
12 GLA was not enacted by Defendant, the AGO, or any other agency of the CNMI. The GLA
13 was enacted by the CNMI Legislature as “a necessary and proper use of [its] legislative
14 power.” PL 15-22 § 2. Furthermore, the Legislature’s enactment of such a law serves a
15 legitimate government interest and thus meets rational basis review. Second, the Court finds
16 that the CNMI and an agency of the CNMI constitute the same entity. If a judgment is
17 rendered against the agency, the CNMI is compelled to pay that judgment, not the agency.
18 Thus, the GLA does not make a distinction between claims against the CNMI or an agency
19 thereof, and the Court rejects Plaintiff’s tri-categorization. Therefore, the GLA does apply to
20 this action.

21 **B. The Plaintiff Failed to Comply with the GLA Statutory Requirements**

22 In applying the provisions of the GLA to this case, upon reading Plaintiff’s complaint it
23 is clear that he has made no attempt to actually comply with the GLA provisions. Plaintiff

1 made no effort to contact the AGO and submit his claim in compliance with 7 CMC § 2202(b).
2 Plaintiff should have brought his claim to the AGO to allow them to properly investigate his
3 claim and possibly proceed with a settlement. However, in failing to comply with this
4 requirement Plaintiff has undercut the basic policy behind the GLA and instituted this possibly
5 unnecessary lawsuit prematurely. Thus, because Plaintiff failed to comply with the statutory
6 requirements of the GLA, this Court does not now have subject matter jurisdiction to
7 adjudicate Plaintiff's claim.³

8 Therefore, this Court finds the GLA does not violate the separation of powers clause of
9 the CNMI or United States Constitutions, the GLA does apply to this action, and Plaintiff
10 failed to comply with the GLA. Upon these findings, the Court does not have subject matter
11 jurisdiction over this matter and must grant Defendant's Motion to Dismiss without prejudice.

12 **2. PERSONAL JURISDICTION**

13 Defendant's motion also argues that the AGO was not properly served and thus, this
14 Court lacks personal jurisdiction. Defendant asserts that there are special procedural
15 requirements that must be complied with in order to affect service upon and brings suit against
16 the CNMI, including the requirement that service must be made by mail or personal service.
17 Plaintiff asserts that service was proper because Defendant was served with a hard copy of the
18 Complaint and Summons and the AGO was e-served with a copy of the Complaint and
19 Summons.

20 A plaintiff suing the CNMI or any of its agencies must serve a copy of the summons
21 and complaint to the AGO and agency being sued. *See* NMI R. Civ. P. 4(i)(1)-(2).
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³ As was discussed above, Plaintiff has not asserted a constitutional violation and thus no exception to sovereign immunity applies.

1 In this matter the Court agrees with the Plaintiff. “New civil complaints” are among
2 the pleadings that “shall be filed and served electronically.” NMI R. Elec. Filing and Services
3 3.6. Rule 3.6 applies to Electronic Filing Service Provider users, which includes both Plaintiff
4 and the AGO. *See Id.* at 1.1. The Court also agrees that upon the e-filing and e-serving of the
5 Complaint and Summons in this case, Defendant and the AGO would be properly served with
6 process. *See Id.* at 6.1; 6.2; and 6.6. However, upon reviewing the file, the Complaint and
7 Summons were submitted as “File Only” and there was nothing listed in the “Receiving Party”
8 space. Furthermore, the Court also looked at the case file and found a Certificate of Service;
9 however, this was only addressed to DPS. As a result, Plaintiff failed to properly serve the
10 AGO either electronically or with a hard copy of the Complaint and the Summons and thus, the
11 AGO was never served. Consequently, the Court does not have personal jurisdiction over
12 Defendant until Plaintiff properly affects service pursuant to NMI R. Civ. P. 4(i).

13 **CONCLUSION**

14 For the foregoing reasons, Defendant’s motion to dismiss for lack of subject matter and
15 personal jurisdiction is GRANTED without prejudice for the reasons set forth above.

16 **IT IS SO ORDERED** this 26th day of November, 2014.

17
18 /s/
19 **ROBERTO C. NARAJA**, Presiding Judge