



E-FILED
CNMI SUPERIOR COURT
 E-filed: Apr 29 2019 03:13PM
 Clerk Review: N/A
 Filing ID: 63206007
 Case Number: 15-0032-CV
 N/A



FOR PUBLICATION

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By order of the Court, Judge Joseph N. Camacho

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

LARS INDALECIO PALACIOS, Plaintiff, v. COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Defendant.) CIVIL ACTION NO. 15-0032)) ORDER DENYING PLAINTIFF’S MOTION) TO AMEND COMPLAINT BECAUSE) LAWSUITS AGAINST THE) COMMONWEALTH GOVERNMENT) REQUIRE EXHAUSTION OF) ADMINISTRATIVE REMEDIES MEANING) A “PREMATURE COMPLAINT” CANNOT) BE CURED THROUGH AMENDMENT) BUT INSTEAD PLAINTIFFS MUST FILE A) NEW LAWSUIT)
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I. INTRODUCTION

This matter came before the Court on January 29, 2019 on Plaintiff’s Motion for Leave to Amend Complaint (“Motion to Amend”) filed on December 6, 2018. Matthew Holley, Esq. appeared and represented Plaintiff Lars Indalecio Palacios (“Palacios”). The Defendant Commonwealth Government was represented by Office of the Attorney General Chief of Civil Division Christopher Timmons.

In response to Palacios’ Motion to Amend, the Commonwealth Government filed Defendant’s Opposition to Plaintiff’s Motion for Leave to Amend Complaint and Motion to Strike on December 20, 2018. Palacios filed his Reply to Defendant’s Opposition for Leave to Amend and Motion to Strike on January 14, 2019.

1 Based on a review of the filings, oral arguments, and applicable law, the Court orders
2 as follows.

3 **II. STATEMENT OF FACTS**

4 On February 23, 2015, Palacios filed his Complaint in this action against John
5 Duenas San Nicolas (“San Nicolas”) alleging bodily injuries and property damage stemming
6 from a motor vehicle accident on May 27, 2014. On April 28, 2016, Palacios sent a notice of
7 claim to the Office of the Attorney General concerning the alleged injury. However, neither
8 the notice of claim nor Palacio’s complaint, which had been attached to the notice of claim,
9 provided a sum certain of damages sought. The Office of the Attorney General did not
10 respond to the claim within the ninety-day statutory period outline in 7 CMC § 2202(b).
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12 The Commonwealth Government petitioned the Court to substitute the
13 Commonwealth Government as Defendant because it asserted that San Nicolas was acting
14 within the scope of his employment at the time of the alleged incident. The Court granted
15 the Commonwealth Government’s petition to substitute San Nicolas on January 30, 2018.
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17 On September 5, 2018, the Court dismissed Palacios’ Complaint without prejudice
18 for lack of subject matter jurisdiction because Palacios failed to provide a sum certain for
19 monetary damages with his notice of claim as required by the Government Liability Act.¹

20 On or about September 13, 2018,² Palacios submitted a notice of claim to the Office
21 of the Attorney General, indicating a sum certain for monetary damages. Ninety (90) days
22 have passed since the Office of the Attorney General has received the notice of the claim but
23 Palacios has not received any response.
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25 ¹ See *Lars Indalecio Palacios v. Commonwealth*, Civ. No. 15-0032 (NMI Super. Ct. Sept. 05, 2018) (Order
26 Dismissing without Prejudice for Lack of Subject Matter Jurisdiction Pursuant to the Government Liability Act
7 CMC § 2202(b) that requires a Sum Certain for Monetary Damages Accompany the Notice of Claim filed
with the Office of the Attorney General for Purposes of Allowing Prompt Investigation and Possible
Settlement).

² Plaintiff stated in his pleadings that the submission of notice of claims was made “on or about” September 13,
2018.

1 Palacios now attempts to cure his original complaint of its jurisdictional defect by
2 moving for leave to amend his complaint now that he has exhausted his administrative
3 remedies under the Government Liability Act. Palacios argues that leave to amend must be
4 freely given under Rule 15(a) of the Northern Mariana Islands Rules of Civil Procedure and
5 that public policy favors deciding cases on the merits.

6 Defendant Commonwealth Government moved to strike the Motion to the Amend as
7 immaterial because Palacios cannot cure his original complaint through an amendment but
8 must file a new suit (“Motion to Strike”).

9 III. LEGAL STANDARD

10 A. Rule 12(f)

11 Rule 12(f) of the Northern Mariana Islands Rules of Civil Procedure states in
12 pertinent part that “[u]pon motion made by a party before responding to a pleading [...] the
13 court may order stricken from any pleading any insufficient defense or any redundant,
14 immaterial, impertinent, or scandalous matter.” NMI R. CIV. P. 12(f). A matter is
15 “immaterial” if it “has no essential or important relationship to the claim for relief or the
16 defenses being pleaded.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir.
17 2010) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)).³

18 A motion to strike is not the proper mechanism to oppose an irrelevant argument or
19 an insufficient pleading. *PRC v. Chang Shen*, Civ. No. 12-0163 (NMI Super. Ct. Aug. 8,
20 2014) (Order Denying Pl. PRC’s Mot. for a Declaratory Judgment and Denying Def.’s
21 Mot. to Strike at 3). Rather, a party should attack a failure to state a valid legal claim by
22 filing a motion to dismiss under Rule 12(b)(6). NMI R. CIV. P. 12(b)(6); *see also*
23 *Whittlestone Inc.*, 618 F.3d at 974-75. (holding that “Rule 12(f) does not authorize [...]”
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³ “[W]hen our rules are patterned after the federal rules it is appropriate to look to federal interpretation for guidance.” *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60. Compare NMI R. CIV. P. 12(f), with FED R. CIV. P. 12(f).

1 courts to strike claims for damages on the ground that such claims are precluded as a
2 matter of law”). Furthermore, a party should move to dismiss a complaint on the grounds
3 that the court lacks jurisdiction over the subject matter by filing a motion to dismiss under
4 Rule 12(b)(1). NMI R. CIV. P. 12(b)(1); *see also Atalig v. Commonwealth Election*
5 *Comm'n*, 2006 MP 1 ¶ 16.

6 **B. Rule 12(h)(3)**

7 Rule 12(h)(3) states that “[w]hensoever it appears by suggestion of the parties or
8 otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the
9 action.” NMI R. CIV. P. 12(h)(3) (emphasis added). Therefore, this Court may raise the
10 issue of lack of subject matter jurisdiction *sua sponte*. *See Cody v. NMI Ret. Fund.*, 2011
11 MP 16 ¶ 10 (quoting *D’lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th
12 Cir. 2008)). The standard of review of a Rule 12(h)(3) challenge to the Court’s jurisdiction
13 over the subject matter is the same as a motion to dismiss brought under Rule 12(b)(1). *See*
14 *Molski v. Thai Palace Corp.*, 2005 U.S. Dist. LEXIS 45300, at *6 (C.D. Cal. July 29,
15 2005).⁴

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17 Rule 12(b)(1) of the Northern Mariana Islands Rules of Civil Procedure provides
18 for dismissal for “lack of jurisdiction over the subject matter.” NMI R. CIV. P. 12(b)(1).
19 “When ruling on a motion to dismiss for lack of subject matter jurisdiction under
20 Rule 12(b)(1), the court must accept as true the complaint’s undisputed factual allegations
21 and construe the facts in the light most favorable to plaintiff.”⁵ *Atalig*, 2006 MP 1 ¶ 16.
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⁴ Compare NMI R. CIV. P. 12(h)(3), with FED R. CIV. P. 12(h)(3).

⁵ Here, the Court will construe the facts in the light most favorable to Palacios because Palacios asserted the claim over which the Court’s jurisdiction is being challenged.

IV. DISCUSSION

A. Rule 12(f)

Here, Defendant Commonwealth Government's Motion to Strike must be denied because Palacios' Motion to Amend is not immaterial. Palacios' Motion to Amend seeks the Court to grant him leave to amend his complaint on the grounds that leave to amend should be freely granted under Rule 15(a) and that public policy favors a decision on the merits. Both of these assertions relate to Palacios' claim for relief. *See Whittlestone, Inc.*, 618 F.3d at 974 (finding that "the claim for damages is not immaterial, because whether these damages are recoverable relates directly to the plaintiff's underlying claim for relief"). Therefore, Defendant Commonwealth Government's Motion to Strike must be denied.

However, for the reasons provided below, Palacios' Motion to Amend must also be denied because Palacios' complaint cannot be cured of its jurisdictional deficiencies by an amended complaint.

B. Rule 12(h)(3)

The Superior Court lacks subject matter jurisdiction to adjudicate a claim brought under the Government Liability Act ("GLA"), 7 CMC § 2201, if the claimant fails to exhaust its administrative remedies before pursuing its GLA claim in Superior Court. *See Lars Indalecio Palacios v. Commonwealth*, Civ. No. 15-0032 (NMI Super. Ct. Sept. 05, 2018) (Order Dismissing without Prejudice for Lack of Subject Matter Jurisdiction Pursuant to the Government Liability Act 7 CMC § 2202(b) that requires a Sum Certain for Monetary Damages Accompany the Notice of Claim filed with the Office of the Attorney General for Purposes of Allowing Prompt Investigation and Possible Settlement at 7-8); *see also McNeil v. United States*, 508 U.S. 106, 112 (1993) (holding that plaintiffs must completely exhaust their administrative remedies before invoking the judicial

1 process if the case is brought under the Federal Tort Claims Act (“FTCA”) – which is the
2 federal equivalent of a GLA claim).⁶ This exhaustion entails claimants presenting their
3 claims to the Attorney General. 7 CMC § 2202(b). Only after the claim has been denied by
4 the Attorney General – either in writing or by the Attorney General’s failure to make a
5 final deposition within ninety days after presentment – may a claimant bring an action
6 against the Commonwealth Government for money damages. 7 CMC § 2202(b).

7 Rule 15(a) of the Northern Mariana Islands Rules of Civil Procedure states that “[a]
8 party may amend its pleading once as a matter of course at any time before a responsive
9 pleading is served [...] otherwise a party may amend the party’s pleading only by leave of
10 court or by written consent of the adverse party[.]” NMI R. Civ. P. 15(a). When leave of
11 court is required to amend the pleading, Rule 15(a) states that “leave shall be freely given
12 when justice so requires.” NMI R. Civ. P. 15(a). However, motions to amend that require
13 leave of court may also be denied for several reasons – such as if the amendment would be
14 futile. *See e.g., Commonwealth v. Superior Court*, 2008 MP 11 ¶ 14; *Mo. ex rel. Koster v.*
15 *Harris*, 847 F.3d 646, 656 (9th Cir. 2017).⁷

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17 The question here is whether Palacios may cure his original complaint of his
18 jurisdictional deficiencies by filing an amended complaint after exhausting his
19 administrative remedies. This question has been answered by other jurisdictions in the
20 negative. *See Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999); *Monier v. United*
21 *States*, 2017 U.S. Dist. LEXIS 191736, at *3 (S.D. Cal. Nov. 20, 2017); *White v. United*
22 *States*, 2017 U.S. Dist. LEXIS 127140, at *16 (S.D. Ill. Aug. 10, 2017); *Kawam v. United*
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26 ⁶ The federal courts cited analyzed 28 U.S.C. § 2675(a), known as the Federal Torts Claims Act, the federal
equivalent of 7 CMC § 2202(b). *Compare* 7 CMC § 2202(b) *with* 28 U.S.C. § 2675(a); *see also* *Castro v. CNMI Department of Public Safety*, Civ. No 14-0051 (NMI Super. Ct. Dec. 11, 2014) (Order Granting Defendant’s Motion to Dismiss at 4). When a Commonwealth law mirrors a federal law, Commonwealth courts may look to federal cases interpreting the equivalent provisions of the federal law for guidance. *See Tudela v. Superior Court*, 2010 MP 6 ¶ 19.

⁷ *Compare* NMI R. Civ. P. 15(a), *with* FED R. Civ. P. 15(a).

1 *States*, 2015 U.S. Dist. LEXIS 88906, at *17 (D.N.J. July 9, 2015); *Ortiz-Romany v.*
2 *United States*, 497 F. Supp. 2d 285, 294 (D.P.R. 2007); *Sparrow v. United States Postal*
3 *Serv.*, 825 F. Supp. 252, 255 (E.D. Cal. 1993).

4 In *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999), the tenth circuit
5 analyzed the Supreme Court of the United States' decision in *McNeil v. United States*, 508
6 U.S. 106, 112 (1993), and stated that as a general rule, a FTCA complaint filed
7 prematurely "cannot be cured through amendment, but instead, plaintiff must file a new
8 [law]suit." (quoting *Sparrow*, 825 F. Supp. at 255). Without this general rule, the court in
9 *Duplan* stated that the exhaustion requirement would be rendered meaningless and the
10 judicial system would be unnecessarily burdened. See *Duplan*, 188 F.3d at 1199. Because a
11 party cannot cure a failure to exhaust its administrative remedies through an amended
12 complaint, a motion to amend a jurisdictionally deficient GLA complaint under Rule 15(a)
13 must be denied as futile. See *Wiens v. United States Veterans Hosp.*, 2017 U.S. Dist.
14 LEXIS 186386, at *6 (E.D. Cal. Nov. 8, 2017); *Edwards v. District of Columbia*, 616 F.
15 Supp. 2d 112, 117 (D.D.C. 2009).

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17 The Court finds the federal case law on the issue of whether a Plaintiff can cure his
18 failure to exhaust his administrative remedies by amending his complaint to be persuasive.
19 Here, the Court dismissed Palacios' complaint for lack of subject matter jurisdiction
20 because Palacios did not provide a sum certain with his notice to claim. Pursuant to the
21 general rule stated in *Duplan*, Palacios needed to have exhausted his administrative
22 remedies before filing his lawsuit in the CNMI Superior Court. Palacios' failure to exhaust
23 his administrative remedies cannot be cured by amending the complaint. Because Palacios
24 cannot cure his failure to exhaust his administrative remedies through an amended
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1 complaint, Palacios' Motion to Amend must be denied as futile and Palacios must file a
2 new lawsuit.⁸

3 **V. CONCLUSION**

4 For the foregoing reasons, a claimant must exhaust his administrative remedies
5 before filing a GLA lawsuit against the Commonwealth Government. Plaintiff Palacios
6 brought a lawsuit against the Commonwealth Government before exhausting his
7 administrative remedies which makes his complaint premature. Because Palacios cannot
8 cure his failure to exhaust his administrative remedies by amending his complaint,
9 Palacio's Motion to Amend must be denied as futile and Palacios must file a new lawsuit.
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11 THEREFORE, Plaintiff Palacios' Motion for Leave to Amend Complaint is DENIED.

12 **SO ORDERED** this 29th of April, 2019.

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15 /s/



16 **JOSEPH N. CAMACHO**, Associate Judge
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25 ⁸ There are exceptions to *Duplan's* general rule – however, none of the exceptions apply here. The court in
26 *Duplan* provided for an exception where the parties and the court all agree to administratively close the case
until the administrative process is resolved. 188 F.3d 1199-1200. However, Palacios does not qualify for this
exception because, just as in *Booker v. United States*, No. 13-1099, 2015 U.S. Dist. LEXIS 81735, at *16 n.9
(E.D. Pa. June 24, 2015), the Commonwealth Government objects to the use of the amended complaint to cure
Palacios' original complaint of his jurisdictional defect. Additionally, the exception in *Valadez-Lopez v.*
Chertoff, 656 F.3d 851, 856 (9th Cir. 2011) does not apply here because the complaint Palacios is attempting to
amend already asserts a GLA claim against the Commonwealth Government.