

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STEVEN FORMAN,	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
UNITED STATES OF AMERICA AND	:	
UNITED STATES POSTAL SERVICE	:	NO. 98-6784
	:	

MEMORANDUM AND ORDER

YOHN, J.

October 6, 1999

Before the court is defendant's motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(5). The suit was brought under the Federal Tort Claims Act ("FTCA") and resolution of the motion to dismiss requires me to address statutory requirements of administrative exhaustion, agency notice of claim denial, the statutory limitations period, and equitable tolling.

The plaintiff Steven Forman ("plaintiff") alleges that he was injured in a slip and fall accident at a local branch of the United States Post Office. He retained attorney Small who filed an administrative complaint against the United States Postal Service ("USPS") and the United States (jointly "defendants"). On an unspecified date before the agency decided plaintiff's claim, Small became unable to continue representing plaintiff. However, neither Small nor the plaintiff notified the Postal Service. Also prior to an agency final decision, plaintiff retained attorney Rice, who instituted suit in federal court. Shortly thereafter, USPS denied plaintiff's

administrative claim and so notified Small in a letter of final denial. Rice was not notified of the final denial of the administrative claim as he had not entered an appearance on the administrative claim. Nonetheless, the agency letter was adequate under the FTCA statutory and regulatory provisions.

When the letter of final denial was mailed, a six-month statute of limitations started to run on time to institute suit. Plaintiff's suit by Rice was later dismissed as prematurely filed. Thereafter, but outside of the six-month limitations period, this suit was instituted. I conclude that this suit was untimely filed and that the court therefore lacks subject matter jurisdiction over this action.

Plaintiff suggests, however, that the limitations period should be equitably tolled until the date on which Rice had constructive notice of the denial letter sent to Small. I disagree. I conclude that the doctrine of equitable tolling is likely applicable to the FTCA six-month limitations period. Despite that conclusion, I find that plaintiff does not allege facts sufficient to bring him within the very narrow scope of that equitable doctrine.

The court has considered defendants' motion to dismiss pursuant to Rule 12(b)(1) (Doc. No. 6), plaintiff's response to defendants' motion (Doc. No. 7), and defendants' reply memorandum to plaintiff's response (Doc. No. 9). For reasons explained below, the motion pursuant to Rule 12(b)(1) will be granted and the complaint will be dismissed for lack of subject matter jurisdiction.¹

¹ Defendants' Rule 12(b)(5) motion has not been pursued.

FACTUAL BACKGROUND

The factual background is virtually undisputed for purposes of this motion. The complaint alleges that on April 21, 1996, plaintiff began to climb the stairs of the Bryn Mawr branch of the United States Post Office. See Complaint at ¶ 7. A broken step caused him to fall. See id. His fall caused him injury. See id. at ¶¶ 9-14. Plaintiff sought compensation.

Plaintiff retained attorney Lewis Small, who initiated the administrative complaint process on May 17, 1996, with USPS. See Forman v. United States, CA No. 98-2108 (E.D. Pa. Apr. 21, 1998) [hereinafter “Forman I”] (Doc. No. 5, exh. 1) (letter from Small to USPS). Over the next two years, Small and the USPS corresponded regarding administrative claim procedure. See Forman I, Doc. No. 5, exhs. 1-8. Ultimately, a valid administrative claim was filed with USPS on March 13, 1998, on plaintiff’s behalf by attorney Lewis Small. See Defendants’ Motion to Dismiss, Doc. No. 6, at Declaration of Francis M. Bartholf ¶ 6 & exh. 2; Plaintiff’s Resp. to Defs. Mot. to Dismiss, Doc. No. 7 [hereinafter “Pl. Resp.”], exh. A at 1. Allegedly, Small soon became disabled and ceased practicing law, although the dates of disability and his cessation of practice are not established anywhere in the record.

Plaintiff retained other counsel, attorney David Rice. Rice did not pursue the administrative claim filed by Small. Instead, he filed suit (not this action) against defendants in the United States District Court for the Eastern District of Pennsylvania on April 21, 1998. See Forman I, Doc. No. 1. Plaintiff’s administrative claim, pending when suit was filed, was resolved shortly thereafter, and on May 8, 1998, USPS sent to Small a certified letter finally denying the claim. See Reply Mem. of Law in Support of Fed. Defs. Mot. to Dismiss, Doc. No. 9, at Declaration of Francis M. Bartholf [hereinafter “Bartholf Decl.”] ¶ 9 & exh. 2. There is

nothing in the record establishing that Rice notified USPS that he was handling the administrative claim or that he notified USPS that Small was disabled and not practicing law.²

On June 26, 1998, defendants filed an answer to plaintiff's first suit. See Forman I, Doc. No. 4. The answer included affirmative defenses asserting lack of jurisdiction for failure to exhaust administrative remedies and asserting that "Plaintiff's recovery, if any, is limited to the amount set forth in his administrative claim, \$30,000." See Forman I, Doc. No. 4, 2d & 5th Aff. Defs. On August 5, 1998, Assistant United States Attorney Nancy Griffin sent plaintiff a letter reiterating defendants' position that jurisdiction was improper because administrative remedies had not been exhausted prior to institution of suit. See Pl. Resp., exh. C. Griffin promised to move for dismissal if Rice did not do so voluntarily. See id. Griffin made good that promise on October 30, 1998, moving for dismissal on the ground that the court lacked subject matter jurisdiction over the premature suit. See Forman I, Doc. No. 5. No response was filed and the motion was granted without prejudice on December 1, 1998. See Forman I, Doc. No. 6. On December 31, 1998, Rice filed this suit. See Doc. No. 1.

Defendants have moved to dismiss this suit for lack of subject matter jurisdiction, asserting that the present suit is time-barred as filed beyond the statutory limitations period. I agree.

STANDARD OF REVIEW

Plaintiff bears the burden to prove that the relevant jurisdictional requirements are met. See Development Fin. Corp. v. Alpha Housing & Health Care, 54 F.3d 156, 158 (3d Cir. 1995);

² On the contrary, USPS counsel investigating the administrative claim states that he received no notice regarding Small's disability or Rice's representation. See Bartholf Decl. ¶¶ 12-13 (Doc. No. 9).

Mellon Bank (East) PSFS v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992); Gehling v. St. George's Sch. of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985). “[W]hen there is a factual question about whether a court has jurisdiction, the trial court may examine facts outside the pleadings ... [b]ecause at issue in a factual 12(b)(1) motion is the trial court’s jurisdiction--its very power to hear the case.’” See Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (citing Mortensen v. First Federal Savings and Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977)). Plaintiff’s factual allegations need not be accepted as true. See Robinson v. Dalton, 107 F.3d at 1021. The court may consider facts not in the complaint. See id. Consequently, plaintiff must present “affidavits or other competent evidence that jurisdiction is proper.” See Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir.), cert. denied, 519 U.S. 1028 (1996). Where the complaint and affidavits are relied upon to satisfy its burden, the plaintiff succeeds by making a prima facie showing that jurisdiction exists. See Friedman v. Israel Labour Party, 957 F. Supp. 701, 706 (E.D. Pa. 1997). “Factual discrepancies created by affidavits are generally resolved in favor of the non-moving party.” Id.; see also Carteret Savings Bank v. Shushan, 954 F.2d 141, 142 n. 1 (3d Cir.), cert. denied, 506 U.S. 817 (1992).

DISCUSSION

The United States is immune from suit. See United States v. Dalm, 494 U.S. 596, 608 (1990). Nevertheless, the United States may be sued if Congress unequivocally waives its immunity. See United States v. Dalm, 494 U.S. at 608; United States v. King, 395 U.S. 1, 4 (1969). Congress has waived federal immunity to suit in tort under the Federal Tort Claims Act, subject to conditions and limitations. See 28 U.S.C. §§ 1346(b) (1993) (jurisdiction in tort suits), 2761-80 (1994) (jurisdictional prerequisites), 2401(b) (1994) (limitations period for tort claims

and suits); McNeil v. United States, 508 U.S. 106, 113 (1993); Reo v. United States Postal Svc., 98 F.3d 73, 75 (3d Cir. 1996).

Under the FTCA, an injured party may seek money damages from the United States for wrongful acts or omissions of federal employees occurring within the scope of their employment if a private party could be held liable for such act or omission under the law of the jurisdiction. See 28 U.S.C. § 1346(b); Reo v. United States Postal Svc., 98 F.3d at 75. No suit may be instituted, however, until an administrative claim for relief is filed with the agency responsible for the injury. See § 2675(a); McNeil v. United States, 508 U.S. at 112. The administrative claim must be filed within two years of the claim's accrual. See § 2401(b); 39 C.F.R. § 912.3(a). Even after filing the administrative claim, no suit may be instituted until the agency finally denies the claim by mailing a denial letter. See § 2675(a).³ Within six-months after the letter of denial is mailed, the claimant must institute suit or "be forever barred" from doing so. See §2401(b); 39 C.F.R. § 912.3(b).

Four questions are presented, which will be resolved seriatim. First, did plaintiff exhaust his administrative requirements? Second, did defendants provide satisfactory notice of final denial? Third, was plaintiff's suit timely considering the statute of limitations requirement? Fourth, if untimely, may plaintiff still maintain suit for equitable reasons?

³ An agency is given six-months to consider the claim before suit may be filed. See § 2675(a). If an agency does not grant, settle or deny a claim within six-months, a claimant may deem it denied and institute suit any time thereafter. See § 2675(a); Reo v. United States, 98 F.3d at 78.

I. Plaintiff Properly Exhausted His Administrative Requirements.

A tort “action shall not be instituted upon a claim against the United States for money damages ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been fully denied by the agency.” See § 2675(a). Failure to satisfy this requirement deprives a district court of jurisdiction over a suit instituted by an injured party. See § 2675(a); McNeil v. United States, 508 U.S. at 112.

Plaintiff, through attorney Small, filed a proper administrative complaint with USPS on March 13, 1998. A letter of final denial was mailed on May 8, 1998. No objection is made to the satisfaction of the requirement, and thus plaintiff’s present suit is not barred for failure to exhaust administrative remedies.

II. USPS Satisfied Its Statutory Obligation To Mail Plaintiff Or His Attorney Notice Of Final Denial Of His Administrative Claim.

The FTCA requires the final denials of administrative claims be “in writing and sent by certified or registered mail.” See § 2675(a). Implementing regulations require that a letter of denial to be sent to the “claimant, his attorney, or legal representative by certified or registered mail.” See 39 C.F.R. § 912.9. A claimant’s legal representative is one who signs and presents a claim accompanied by “evidence of his authority to present a claim on behalf of the claimant...” See 39 C.F.R. § 912.6(e).⁴

⁴ Neither the FTCA nor its implementing regulations provide more detail as to who may be a legal representative. See Reo v. United States Postal Svc., 98 F.3d at 76. The Third Circuit has looked to state law to supply content to the term. See id. It did so in a case where there was no need for nationwide standards and state law was not in conflict with federal policy. See id. In that matter, however, the court was concerned with the authority of a parent to settle the claims of a minor child. See id. at 76. This matter is distinguishable. This case concerns the notice requirement of § 2675(a), not the settlement requirement of § 2672. While notice is

Small instituted the administrative complaint on plaintiff's behalf, and in so doing provided documentation that he was authorized to act as plaintiff's agent. See Forman I, Doc. No. 5 exhs. 1 & 7; 39 C.F.R. § 912.6(e). Only two months later, USPS mailed the letter of denial to Small. Plaintiff asserts that the filing of the federal suit by Rice, 17 days before final denial of the administrative claim, constructively notified defendants that Rice replaced Small as counsel for plaintiff. The allegation of constructive notice is unsupported by case law and is problematic in several respects.

First, the terms of the implementing regulation permit notice in the alternative to "claimant, his attorney, or legal representative." See 39 C.F.R. § 919.9. Case law favors the view that the letter of denial may be sent to either counsel or claimant. See, e.g., Hanson v. United States, 908 F.2d 257, 258 (8th Cir. 1990); Childers v. United States, 442 F.2d at 1301-

designed to encourage settlement, it is more limited in scope of delegated authority. Notice speaks only to authority to present the claim, not to the authority to terminate the claim. Plaintiff's authorization of Small was sufficient.

Pennsylvania law does not require a different conclusion. First, in Pennsylvania a letter authorizing representation is "prima facie authority to represent" a client. See Shapp v. Sloan, 365 A.2d 169, 172 (Pa. Commw. Ct. 1976). Plaintiff submitted such a letter authorizing Small to represent him in the administrative hearing. See Forman I, Doc. No. 5, exhs. 1 & 7. Small had actual authority to represent plaintiff in the administrative proceeding. Second, even if actual authority terminated on Small's disability, plaintiff did nothing to dispel the appearance of authority. The doctrine of apparent authority is recognized in Pennsylvania courts. See Joyner v. Harleysville Ins. Co., 574 A.2d 664, 667 (Pa. Super. Ct. 1990). Apparent authority is created when a principal, by deed or declaration, leads third parties to believe that an agent has the right and power to act on behalf of the principal in some capacity. See id. "The third party is entitled to believe the agent has the authority he purports to exercise only where a person of ordinary prudence, diligence, and discretion would so believe." See id. at 667-68. Thus, even when actual authority has terminated, a client may still be bound by the acts of his attorney where there exists reasonable appearance of authority. Plaintiff did not revoke his authorization of Small, and thus Small appeared as plaintiff's authorized legal representative for the administrative claim. An attorney is an agent of the client with broad authority to act on behalf of the client in matters of procedure. See Grocery & Good Warehousemen, Local Union 635 v. Kroger Co., 70 A.2d 218, 219 (Pa. 1950).

02; McCaffrey v. Nylon, Inc., Civ. A. No. 95-3787, 1996 WL 122710 at *2 (E.D. Pa. Mar. 13, 1996); Pascarella v. United States, 582 F. Supp. 790, 792 (D. Conn. 1984). Such holdings are consistent with the rule that the attorney is agent of the client. See supra note 4. Absent repudiation, the client's grant of authority will remain binding on a claimant. Compare Childers v. United States, 442 F.2d at 1301-02 (holding that notice of denial sent to law partnership was binding on client who did not repudiate partnership's representation after death of partner who actually handled administrative claim). Notice to Small, plaintiff's authorized administrative counsel, was permissible.

Second, plaintiff suggests that the simple act of instituting suit in court should suffice to put an agency on notice of a claim. The suggestion would undo much of what the 1966 amendments to the FTCA were designed to achieve. See Tucker v. United States Postal Svc., 676 F.2d 954, 958 (3d Cir. 1982) (discussing purpose of exhaustion requirement). Under "prior practice, ... a claimant first filed suit, then the United States Attorney referred his or her complaint to the agency." See Tucker, 676 F.2d at 958 (citing S. Rep. No. 89-1327 (1966) ("S. Rep."), reprinted in 1966 U.S.C.C.A.N. 2515, 2516). In 1966, the FTCA was amended to require administrative review of all claims filed against federal agencies before suit could be instituted. See July 18, 1966, Pub. L. 89-506 § 7, 80 Stat. 307. The Third Circuit has identified two purposes for the exhaustion requirement. First, "Congress sought 'to ease court congestion ... while making it possible for the Government to expedite the fair settlement of tort claims.'" See Tucker, 676 F.2d at 958 (quoting S. Rep. reprinted in 1966 U.S.C.C.A.N. at 2516). Second, Congress attempted to provide for "fair and equitable treatment of private individuals and claimants." See Tucker, 676 F.2d at 958 (quoting S.Rep. at 5, reprinted in 1966 U.S.C.C.A.N. at

2515-16). The administrative exhaustion requirement was intended to facilitate settlement by increasing both agency expertise and uniformity of treatment while reducing the number of suits instituted. The goals of the FTCA exhaustion requirement would be undermined if I adopted plaintiff's suggestion that suit notifies an agency of counsel's identity and claim. Plaintiff's suggestion is also in tension with Supreme Court holdings on the matter. The Supreme Court has held that the exhaustion limitations period is not tolled by the premature institution of suit. See McNeil v. United States, 508 U.S. at 112-13. A suit neither substitutes for nor serves as an administrative complaint.

Third, the terms of the statute make mailing, not receipt, the relevant act. See § 2401(b); see also Tribue v. United States, 826 F.2d 633, 635-36 (7th Cir. 1987); Kollios v. United States, 512 F.2d 1316, 1317 (1st Cir. 1975). Agency obligations are discharged on proper mailing, irrelevant of poor or failed communications among those notified of denial. See, e.g., Childers v. United States, 442 F.2d at 1303; Pascarella v. United States, 582 F. Supp. 790, 792 (D. Conn. 1984) (notice signed for and misplaced by employee of plaintiff's attorney was sufficient even though it was never given to claimant's counsel). Once the denial letter was properly sent to Small's office, Small's failure to so notify Rice "is not material to the government's compliance with the statute." See Pascarella v. United States, 582 F. Supp. at 792. Neither is Rice's failure to investigate the status of the administrative claim any more relevant to USPS's notice obligation.

Plaintiff relies on Graham v. United States, 96 F.3d 446 (9th Cir. 1996), for the proposition that an agency "had to mail notice of the denial of claim to counsel of record." See Pl. Resp. at 3 (quoting Graham v. United States, 96 F.3d at unknown cite) (plaintiff's emphasis).

Graham does not help plaintiff. Considering a linguistically similar Bureau of Prisons regulation, the Graham court held “that the regulation should be interpreted to require notice to counsel where representation is known” and that mailing notice of denial only to the claimant was “contrary to the policy intended by the regulation.” See Graham v. United States, 96 F.3d at 449. In Graham, the claimant’s attorney was “known” to the agency because counsel filed the FTCA administrative claim and corresponded regularly with the agency during the pendency of the claim. See id. at 447. Factually, Graham favors defendants. Over the space of two years, Small had corresponded with USPS on plaintiff’s behalf. See Forman I, Doc. 5 exhs. 2-8. USPS properly mailed the denial letter to counsel known to represent plaintiff in the administrative proceeding. Legally, the Graham court grounded its decision in the ethical prohibition on contact between an agency and a party known to be represented by counsel. See Graham v. United States, 96 F.3d at 449. In this matter, defendants’ conduct was consistent with the implicit commands of Graham: denial letters should be directed to counsel representing claimant in the administrative matter. There is no record evidence that Rice, when he began to represent plaintiff, notified USPS that he was handling the administrative claim for plaintiff.⁵

I conclude that an agency satisfies its statutory obligation to mail a letter of final denial when it mails the letter to the authorized legal representative who filed the administrative claim and does so without knowledge or notice that authority to represent the claimant no longer exists.

This suit was instituted on December 31, 1998--well over six months after USPS mailed the letter of final denial on May 8, 1998. Consequently, plaintiff’s suit appears untimely. By the

⁵ In fact, there is evidence to the contrary. See Defs. Reply Mem., Doc. No. 9, Statement of Francis M. Bartholf ¶¶ 12-13.

terms of the FTCA, suits instituted beyond the six-month limitations period “shall be forever barred.” See § 2401(b). Plaintiff would have it otherwise and suggests that defendants’ October 30, 1998, motion to dismiss the first suit was Rice’s first written notice that plaintiff’s administrative claim had been denied.⁶ See Forman I, Doc. No. 5, Decl. of Francis M. Bartholf ¶ 9. Plaintiff contends that the December 31, 1998 filing of this suit was timely because the six-month limitations period should be equitably tolled, running from October 30, 1998. I disagree.

III. Equitable Tolling Is Not Available In This Matter.

Equitable tolling extends limitations periods for select reasons. The permissible reasons are considered and applied to the facts in section III.C of this Memorandum. The threshold question is whether equitable tolling may ever extend the FTCA limitations period.

A. The Supreme Court Rebuttably Presumes Equitable Tolling Is Proper.

Courts lack jurisdiction over suits against the United States under the doctrine of sovereign immunity. See Federal Deposit Ins. Co. v. Meyer, 510 U.S. 471, 475 (1994). When Congress waives federal sovereign immunity from suit, “the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” See United States v. Sherwood, 312 U.S. 392, 399 (1941); United States v. Dalm, 494 U.S. at 608. Jurisdictional restrictions include statutes of limitations for instituting suit. See United States v. Dalm, 494 U.S. at 608; United States v. Mottaz, 476 U.S. 836, 841 (1986) (stating that statute of limitations is condition of waiver of sovereign immunity). Therefore, failure to act within the limitations period of the FTCA deprives the court of subject matter jurisdiction.

⁶ I note that this notice is within the six-month statute of limitations period so that Rice could have filed a timely complaint in court even assuming he did not receive the earlier notice.

The jurisdictional character of a limitations period was long believed to preclude equitable extension of the period. See, e.g., Zipes v. Trans World Airlines Inc., 455 U.S. 385, 393 (1982); Peterson v. United States, 694 F.2d 943, 944-45 (3d Cir. 1982). Consistent with that view, the Third Circuit has said that the two-year limitations period for filing administrative claims under the FTCA “cannot be extended by equitable considerations.” See Peterson v. United States, 694 F.2d 943, 944 (3d Cir. 1982). Subsequent decisions contain language suggesting that the rule remains true. See, e.g., Deutsch v. United States, 67 F.3d 1080, 1091 (3d Cir. 1995); Livera v. First Nat’l State Bank of New Jersey, 879 F.2d 1186, 1195 (3d Cir. 1989); Barren v. United States, 839 F.2d 987, 991 (3d Cir. 1988). If these statements of law apply to the six-month period for instituting suit,⁷ then plaintiff’s claim should be dismissed for lack of subject matter jurisdiction.

⁷ There is a difference between the two-year limitations period and the six-month limitations period. Because the principal focus of the FTCA exhaustion requirement was to facilitate early presentation of claims to agencies, see Tucker v. United States Postal Svc., 676 F.2d at 958, the two-year limitation goes to the very core of the administrative exhaustion requirement. The six-month period does not similarly affect the exhaustion requirement. Moreover, the two-year limitations period already permits equitable tolling of sorts. The period doesn’t begin running until a claim accrues, which is when a reasonable person has or should have sufficient facts to put them on notice of a possible claim. See United States v. Kubrick, 444 U.S. 111, 123-24 (1979); Barren v. United States, 839 F.2d at 992. The period also may be tolled under limited circumstances when the United States is substituted as a defendant to an instituted action or proceeding. See 28 U.S.C. § 2679(d)(5). The Supreme Court has explained that where a limitations period implicitly accounts for equitable factors, additional tolling is likely inappropriate. See United States v. Beggerly, 118 S. Ct. 1862, 1868 (1998). The six-month limitations period, on the other hand, neither implicitly nor explicitly accounts for equitable or any other factors: it is entirely silent on the matter.

Recent statements by the Third Circuit indicate a willingness to equitably toll the FTCA limitations periods. See, e.g., United States v. Midgley, 142 F.3d 174, 178-79 (3d Cir. 1998) (citing Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), for the proposition that equitable tolling may apply to statutes of limitations in certain civil actions); Pascale v. United States, 998 F.2d 186, 192 (3d Cir. 1993) (noting that the partial purpose of the FTCA is to provide “more fair and equitable treatment to claimants”).

I am mindful, however, of Supreme Court decisions in the last ten years which indicate that statutes of limitations governing actions against the United States are not per se immune from equitable considerations.⁸ In fact, the Court has said that the “same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.” See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 94-95 (1990) (stating that equitable tolling applies in Title VII suits against the Government on the same terms as it would against a private employer). The Court articulated a rule intended to break with past practice of deciding “each case on an ad hoc basis ... continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress.” See Irwin v. Department of Veterans Affairs, 498 U.S. at 95.⁹ The proper inquiry is now: “Is there a good

⁸ Most other courts of appeals have indicated that one or both of the FTCA limitations periods may be equitable tolled. See, e.g., Solis-Rivera v. United States, 993 F.2d 1, 3 (1st Cir. 1993) (remanding for tolling determination on six-month limitation); de Casenave v. United States, 991 F.2d 11, 13 n.2 (1st Cir. 1993) (saying court should hear equitable tolling argument but denying on facts); Kronisch v. United States, 150 F.3d 112, 123 (2d Cir. 1998) (permitting equitable tolling if defendant conceals wrongdoing or material facts); Perez v. United States, 167 F.3d 913, 917 (5th Cir. 1999) (presuming equitable tolling available under FTCA and on facts); Glerner v. United States, 30 F.3d 697, 701 (6th Cir. 1994) (applying equitable tolling to FTCA two-year limitations period); Goodhand v. United States, 40 F.3d 209, 214 (7th Cir. 1994) (Posner, C.J.) (“Nor can I think of any basis in the [FTCA] for rebuttal of the presumption that equitable tolling (including equitable estoppel) should be a defense.”); Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991) (holding that the FTCA limitations period is an affirmative defense subject to equitable analysis); Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1997) (“Nothing in the FTCA indicates that Congress intended for equitable tolling not to apply.”).

Nor is the rebuttable presumption of equitable tolling inconsistent with the jurisdictional nature of statutes of limitations which waive sovereign immunity. See Heinrich v. Sweet, 44 F. Supp.2d 408, 414 (D.Mass. 1999) (holding a rebuttable presumption of equitable tolling is not inconsistent with the jurisdictional nature of the FTCA limitations period).

⁹ The new rule was little consolation to Irwin, however, for the Court followed federal practice of extending “equitable relief only sparingly,” and affirmed the district court’s dismissal for lack of jurisdiction on the ground that equitable tolling was not permissible on the

reason to believe that Congress did not want the equitable tolling doctrine to apply in a suit against the Government?” See United States v. Brockcamp, 519 U.S. 347, 350 (1997).

The Supreme Court has not decided whether the six-month limitations period of § 2401(b) may be equitably tolled. The Third Circuit also has not confronted this question, which has divided the district courts within the Third Circuit.¹⁰

B. The FTCA Six-Month Limitations Period May Be Equitably Tolled.

I must ask: “Is there a good reason to believe that Congress did not want the equitable tolling doctrine to apply in a suit against the Government?” See United States v. Brockcamp, 519 U.S. at 350. In two recent cases, the Court has considered a number of factors in determining that particular statutes of limitations were not to be equitably tolled. See id. at 352; United States v. Beggerly, 118 S. Ct. 1862, 1868 (1998). They are:

1. whether equity is incorporated already into the statute (as running only after actual or reasonable knowledge of the plaintiff);
2. the length of the limitations period;
3. the substantive area of law;
4. the “emphatic form” of the limitations period, including its coverage, complexity, and restatement;
5. the availability of other explicit exceptions; and
6. the potential administrative burden of equitable tolling.

See United States v. Brockcamp, 519 U.S. at 352; United States v. Beggerly, 118 S. Ct. at

facts. See Irwin v. Department of Veterans Affairs, 498 U.S. at 96-97.

¹⁰ Several courts have held that the six-month period may be equitable tolled. See McCaffrey v. Nylon, Inc., Civ. A. No. 95-3787, 1996 WL 122710, at *1 (E.D. Pa. Mar. 13, 1996) (tolling limitations period where agency misled plaintiff’s attorney); Ezenwa v. Gallen, 906 F. Supp. 978, 985 (M.D. Pa. 1995) (relating back date of suit after compulsory substitution of United States as defendant). Others have denied tolling without commenting on whether it is per se impermissible. See Yillah v. United States, Civ. A. No. 98-2842, 1998 WL 661545, at *3 (E.D. Pa. Sept. 24, 1998) (refusing to toll six-month period on facts due to requirement of strict construction); Dyer v. United States, 827 F. Supp. 339, 340-41 (E.D. Pa. 1993) (same).

1868.¹¹ The articulated factors guide my inquiry.

The Court held in Beggerly that a limitations period that did not begin to run until the claimant knew or should have known of the accrual of the cause of action necessarily eliminated the need for equitable tolling--lack of information despite diligence or misrepresentation by the government. See United States v. Beggerly, 118 S. Ct. at 1868. In contrast, the limitations period governing FTCA suits does not automatically incorporate equitable considerations. Section 2401(b) begins the six-month period on the date the agency mails a denial letter, regardless of whether it was actually received by claimant or counsel. See § 2401(b); 39 C.F.R. § 912.3(b). Courts have permitted tolling when plaintiffs could demonstrate circumstances under which denial was not known or knowable, either due to intervening uncontrollable forces or due to misrepresentation by the government. See, e.g., Perez v. United States, 167 F.3d at 919 (5th Cir. 1999) (tolling where agency with dual state-federal status was sued in the wrong forum and agency misled plaintiff); Alvarez-Machain v. United States, 107 F.3d at 701 (tolling where claimant couldn't bring claim because he was defendant in related criminal matter and because non-English speaker was incarcerated for extended period of time while legally complex case was resolved by Supreme Court); Glarner v. United States, 30 F.3d at 701 (tolling limitations period where agency failed in its duty to provide information to pro se plaintiff); McCaffrey v. Nylon, Inc., 1996 WL 122710, at *1 (tolling limitations period where agency misled plaintiff's attorney). There is no basis for inferring that Congress has pre-empted judicial equitable tolling.

¹¹ Absent from the list is legislative history, which was considered in neither instance. Compare Richard Parker & Ugo Colella, Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of Brockcamp and Beggerly, 29 Seton Hall L. Rev. 885, 905-15 (1999) (arguing that Congressional intent, demonstrated in reports and bills not adopted, was not to apply equitable tolling).

The six-month FTCA limitation period is unlike both the limitation period in Beggerly and the two-year period for claims under the FTCA. See supra note 7. It doesn't toll by its terms.

The presumption favoring equitable tolling is stronger where the limitations period is short. In Beggerly, the Court was persuaded that a 12-year limitations period was sufficiently long that equity need not extend it. See United States v. Beggerly, 118 S. Ct. at 1868. By comparison, the FTCA six-month limitation for suits after final administrative denial is short. Compare Zipes v. Trans World Airlines Inc., 455 U.S. at 398 (holding that the 90-day period of limitation under Title VII is subject to equitable tolling); Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d at 239-240 (same). The FTCA six-month limitations period is not particularly generous. The lack of generosity gives reason to consider equitable tolling in rare cases and permits no inference that Congress gave any thought to equitable tolling of the limitations period.

The Court has considered the nature of the substantive law as relevant to the applicability of equitable tolling to a particular limitations period. In Beggerly, the Court held that the need for settled expectations in land ownership was an important factor in holding that equity could not extend the limitations period of the Quiet Title Act. See United States v. Beggerly, 118 S. Ct. at 1868. Similarly in Brockcamp, the Court held that a limitations period for filing tax refund claims could not be tolled in part because “[t]ax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.” See United States v. Brockcamp, 519 U.S. at 352. In contrast, tort law historically has accounted for individual facts, balancing analyses, and equitable considerations. See W. Page Keeton et al., Prosser & Keeton on The Law of Torts 6 (5th ed. 1984) (stating that the primary purpose of tort law “is to make a fair adjustment of conflicting claims of the litigating parties”); id. at 17 (noting that the focus is often

on “justice of the individual case”). In fact, individual considerations of law must be made in all tort claims under the FTCA, as they depend on liability of private parties “in accordance with the law of the place where the act or omission occurred.” See § 2401(b). “Tort law is overwhelmingly common law, developed in case by case decision making by courts.” See Keeton et al., Prosser and Keeton on The Law of Torts at 19. Unlike cases recently considered by the Court, the very nature of tort law suggests that equitable considerations are proper under the FTCA.

The Court has said that the more complex the limitations provision, the less likely equitable tolling is permissible. See United States v. Brockcamp, 519 U.S. at 350-51. The Court noted that the detailed interlocking of temporal and substantive concerns within a limitations provision suggested that Congress meant to permit no more than what it allowed by its terms. See United States v. Brockcamp, 519 U.S. at 351-52. In comparison, the Court held that the limitations period of Title VII was subject to equitable tolling in part due to the simple language and to the separate treatment of limitations periods from the treatment of substantive questions. See Zipes v. Trans World Airlines Inc., 455 U.S. at 393-94. The FTCA falls somewhere between. While the limitations periods are not complex, they are emphatic. See § 2401(b); compare United States v. Brockcamp, 519 U.S. at 350. Tort suits must be brought within six-months of the mailing of a denial letter or they “shall be forever barred.” See §2401(b) (emphasis added). In Irwin, however, the Court compared similar language to a less emphatic limitations provision and found the particular choice of similar words not dispositive. See Irwin v. Department of Veterans Affairs, 498 U.S. at 95 (declining to find a dispositive difference between two statutes, one saying suit “may” be brought within the period, the other saying late

suits “shall be barred”). Also, as with Title VII, the six-month period of limitations is separated from the grant of jurisdiction. Compare § 2401(b) (“Time for commencing action against the United States”), with § 1346(b)(1) (jurisdiction of district court over “United States as A Defendant”) and § 2675(a) (“Disposition by federal agency as prerequisite”). Thus, the FTCA limitations period is not by statutory text bound to the court’s jurisdiction nor is it part of the exhaustion requirement which has been held a jurisdictional prerequisite.¹² See § 2675(a). There is no good reason to think that limitations periods were to be per se immune from equitable considerations.

The Court has suggested that explicit exceptions to the limitations period favor the view that equitable tolling is not to be permitted. See United States v. Brockcamp, 519 U.S. at 351-52. Where Congress has provided some exceptions, it is presumed fairly to have considered and rejected the unmentioned alternatives. See generally Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395 (1950). The limitations period for tort suits contains no exceptions on its face. See §2401(b). It neither implicitly accounts for equitable tolling nor implicitly denies equitable tolling by providing other limited exceptions. Congress has provided a simple statute of limitation which is silent on the question of equitable tolling.

¹² The provision of the U.S.C. which confers jurisdiction over claims against the United States for money damages, 28 U.S.C. § 1346(b)(1), provides federal district courts with exclusive jurisdiction over civil tort claims for money damages against the United States “[s]ubject to the provisions of chapter 171” of title 28 of the United States Code. That chapter includes the exhaustion requirement, see § 2675(a), but does not include the limitations period, see § 2401(b), which is found in chapter 161 of title 28. If Congress is presumed to mean what it says, then it clearly seems to subject jurisdiction to the fact of exhaustion, while providing a separate statute of limitations based on the time of exhaustion and suit.

Finally, the administrative burden on an agency is to be considered. In Brockcamp, the Court was concerned that equitable tolling of tax refund claims could overburden the IRS due to the millions of claims filed each year. See United States v. Brockcamp, 519 U.S. at 352-53. Although the Court has said that the FTCA “governs the processing of a vast multitude of claims,” see McNeil v. United States, 508 U.S. at 112, FTCA claims number only in the thousands each year. See Parker & Colella, 29 Seton Hall L. Rev. at 889 & n.20 (30,000 to 60,000 FTCA claims filed each year). The number is not a great administrative burden. See Perez v. United States, 167 F.3d at 917 (“[A]llowing equitable tolling would not create an administrative nightmare for the FTCA regime.”).

Although the factors have not been assigned rank or weight by the Court, it is clear that in the balance they favor the view that equitable considerations are applicable to the six-month limitations period. Although the limitations period is still of import in preventing presentation of stale claims, that alone is not a sufficient ground for declining equitable analysis. See Zipes v. Trans World Airlines Inc., 455 U.S. at 394; Irwin v. Department of Veterans Affairs, 498 U.S. at 95. I find no basis to believe that Congress rebutted the presumption of equitable tolling under the FTCA limitations periods.¹³

Plaintiff, however, does not allege facts sufficient to come within the very limited purview of the equitable tolling doctrine.

C. Equitable tolling is not permissible in this matter.

While equitable tolling is rebuttably presumed available against the government when it

¹³ As noted earlier, if the Third Circuit concludes that equitable tolling doesn’t apply to the FTCA limitations period, plaintiff’s complaint still will be dismissed as untimely.

would be available against a private party, “federal courts have typically extended equitable relief only sparingly.” See Irwin v. Department of Veterans Affairs, 498 U.S. at 95-96. The Third Circuit has warned that “limitations periods must be strictly construed.” See Barren v. United States, 839 F.2d at 992. Equitable tolling in the Third Circuit is only permitted if “(1) the defendant has actively misled the plaintiff, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has timely asserted his rights mistakenly in the wrong forum.” See United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998). The doctrine does not forgive “a garden variety claim of excusable neglect.” See Irwin v. Department of Veterans Affairs, 498 U.S. at 96.

Plaintiff intimates that defendant misled him by letter of August 5, 1998, which sought voluntary dismissal of the first lawsuit for failure to exhaust administrative remedies. The letter does not rise to the level of active misrepresentation. The letter suggests only that the court lacked jurisdiction to hear Rice’s first suit, filed April 21, 1998, because administrative remedies had not been exhausted prior to its filing. See Pl. Resp., exh. C at 2. The letter does not suggest that administrative consideration was still pending, nor that the limitations period would be extended. It was a proper statement of law and no more. Letters from agencies which correctly state the law and no more have been found not misleading when claimants have misinterpreted their terms or import. For example, suit was dismissed in a matter where a plaintiff failed to exhaust administrative remedies within the limitations period despite the fact that a timely answer to his judicial complaint would have notified him to file the proper administrative complaint. See McDevitt v. United States Postal Svc., 963 F. Supp. at 484. Also, a plaintiff’s claim was dismissed as time-barred when counsel misunderstood the agency denial letter. See

Yillah v. United States, 1998 WL 661545, at *3 (E.D. Pa. Sept. 24, 1998). Similarly, courts have not penalized omissions by agencies which do not rise to the level of affirmative misrepresentations. See, e.g., Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir. 1998). Moreover, there is no evidence that Rice relied on any statement by defendant's, even if such reliance would have been reasonable.

Nor does plaintiff allege extraordinary circumstances. Plaintiff retained Rice prior to the denial of his administrative claim. At the time he instituted the first suit, the six-month limitations period had not started to run. The relevant failure in this matter is that of Rice to inform himself of either the administrative exhaustion requirement or the status of a pending administrative claim.¹⁴ Such attorney failure is not extraordinary but rather amounts to garden variety excusable neglect. See, e.g., Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 240 (3d Cir. 1999) ("The usual rule is that attorney errors will be attributed to their clients."); de Casenave v. United States, 991 F.2d at 13 (finding no reason for equitable tolling where attorney failed to follow court orders). Counsel has a duty to read the limitations requirement. See Yillah v. United States, 1998 WL 661545, at *3 (E.D.Pa. Sept. 24, 1998) (dismissing claim as untimely despite counsel's assertion that language of denial letter was ambiguous). It is implausible that one who read the requirement would not understand it. See McNeil v. United States, 508 U.S. at 113. The failure is Rice's and although lamentable, it is not extraordinary. Nor is it extraordinary that Small, Rice and plaintiff failed to communicate. For example, where one authorized to receive a letter of denial did so but failed to pass it on to the attorney handling the

¹⁴ Defendants' answers and affirmative defenses to the first suit referred to an administrative proceeding. See Forman I, Doc. No. 4 (2d & 5th Aff. Defs.).

matter, the statute of limitations was not tolled. See, e.g., Pascarella v. United States, 582 F. Supp. at 792 (allowing no equitable tolling where employee of counsel signed for letter but did not bring to the attention of counsel, who filed suit 27 months late). Courts even have held that the death of lead counsel did not require tolling where the denial letter was received by an authorized party. See Childers v. United States, 442 F.2d at 1303 (noting that the death of attorney handling the matter was not cause for tolling where partnership was authorized to receive denial letter, did so, and never took action). This case presents the simple failure of counsel to be aware of the requirement or status of an administrative claim under the FTCA.

Because there was no affirmative misconduct by the agency on which Rice relied, and because there was nothing extraordinary about Rice's failure to understand the administrative exhaustion requirements of the FTCA or to obtain files from Small, plaintiff is left only with "a garden variety claim of excusable neglect." The court concludes that the FTCA six-month limitations period for instituting suit may not be tolled in these circumstances, even assuming that equitable tolling may be applied in this circuit.

CONCLUSION

Because this suit was instituted outside of the FTCA six-month limitations period, and because that period cannot be tolled on the facts of this matter, the court lacks subject matter jurisdiction to hear the suit and will dismiss the complaint pursuant to defendants' Rule 12(b)(1) motion.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STEVEN FORMAN,	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
UNITED STATES OF AMERICA AND	:	
UNITED STATES POSTAL SERVICE	:	NO. 98-6784
	:	

ORDER

And now, this day of October, 1999, upon consideration of defendants' Motion to Dismiss (Doc. No. 6), plaintiff's Response to Defendant's Motion to Dismiss (Doc. No. 7), and defendants' Reply Memorandum of Law in Support of Defendants' Motion to Dismiss (Doc. No. 9), it is HEREBY ORDERED AND DECREED that defendants' motion to dismiss the complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) is GRANTED and the complaint is DISMISSED WITH PREJUDICE.

William H. Yohn, Jr., Judge