

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ANDREW TEMPELMAN,)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>N. H. Civil No. C-02-242-M</i>
)	<i>Maine Civil No. 02-129-P-C</i>
)	
PAUL BARBADORO, et al.,)	
)	
<i>Defendants</i>)	

RECOMMENDED DECISION ON DEFENDANTS’ MOTION TO DISMISS

The federal defendants¹ in this action, which was removed to the United States District Court for the District of New Hampshire by these defendants after it was filed in the New Hampshire Superior Court, Notice of Removal, etc. (included in Docket No. 1), and has been referred to this court due to the entry of recusal by all judges in the District of New Hampshire, Order dated and entered June 4, 2002 (included in Docket No. 1) and Procedural Order (Docket No. 3), move to dismiss all claims asserted against them by the plaintiff, who appears *pro se*.² I recommend that the court grant the motion.

¹ Also named as defendants in the complaint but not joining the motion are Margaret Langdell, William Drescher, members of the Board of Selectmen of Milford, New Hampshire and Frederick Douglas, John Winterburn, Richard Fortin, and Michael Dowd, identified as Milford policemen. Complaint, included in Docket No. 1, at [1].

² The complaint is signed by “Andrew Tempelman, Pro Se For Andrew Tempelman and Priscilla Tempelman, Pro Se.” Complaint at [3]. In all of his other filings in this action, Andrew Tempelman appears *pro se* and does not purport to represent Priscilla Tempelman. Andrew Tempelman is not an attorney admitted to practice in the United States District Court for the District of New Hampshire and therefore I conclude that he lacks the capacity to represent Priscilla Tempelman in this action. Accordingly, Andrew Tempelman is the
(continued on next page)

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(1) and (b)(6). Federal Defendants’ and United States’ Motion to Dismiss, etc. (Docket No. 7) at 1. “When presented with a motion to dismiss, the district court must take as true the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor.” *Medina-Claudio v. Rodríguez-Mateo*, 292 F.3d 31, 34 (1st Cir. 2002) (citation and internal punctuation omitted). The defendant is entitled to dismissal for failure to state a claim only when the allegations are such that the plaintiff can prove no set of facts to support the claim for relief. *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 30 (1st Cir. 2000) (citation and internal punctuation omitted); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

An action may be dismissed pursuant to Rule 12(b)(1) when the court lacks jurisdiction over the subject matter of the action. It is the plaintiff’s burden to prove the existence of subject-matter jurisdiction. *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996).

In ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff.

Id. at 1209-10 (citation omitted). When the jurisdictional facts are disputed by a defendant, materials of evidentiary quality outside the pleadings may be offered to and considered by the court. *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).

II. Factual and Procedural Background

The complaint alleges that Paul Barbadoro, a judge of the United States District Court for the District of New Hampshire, committed libel by “publishing in the legal section of several daily newspapers the known falsehood that Andrew Tempelman and Priscilla Tempelman owed the IRS and

only party plaintiff in this action.

the Town of Milford several hundreds of thousands of dollars in back taxes.” Complaint at [1]. According to the complaint, Judge Barbadoro “ordered the purchase and payment of newspaper advertisements for the auction of the Tempelman property,” and the property at issue was sold at auction on October 23, 2001. *Id.* The complaint further alleges that Judge Barbadoro and defendants Christine Colley, John V. Cardone, David Broderick,³ Gary DiMartino, Richard A. Cooper,⁴ and Megan Smith engaged in a conspiracy to commit libel, violated the plaintiff’s Fourth and Seventh Amendment rights as well as “NH Jury Trial Protection before disputed transfer of title, as well as Croydon constraints,” engaged in a conspiracy to deprive the plaintiff of “Rights and Property,” committed fraud and engaged in a conspiracy to commit fraud. *Id.* These defendants as well as defendants Maria Russo, Paul Proulx, Mark Payeur and Joseph Fallon are alleged to have violated the plaintiff’s Fourth Amendment rights and to have engaged in “Unwarranted Search and Seizure.” *Id.* The complaint also alleges that these defendants “are also charged with Civil Rights abuses under Amendment IV, US Constitution, with using this Libel to engage in Homeland Terrorism of other citizens through the media, using fear and terrorism and hatred and coercion instead of national pride and other such positive inducements in their methods of revenue collection.” *Id.*

Specifically, the complaint alleges that “[t]he falsehood is that the plaintiff and his wife and business, Andrew and Priscilla Tempelman and the Ram in the Thicket, a restaurant, inn, and their church, The Fellowship of Perfect Liberty, owed certain taxes to the Internal Revenue Service and to the Town of Milford.” *Id.* at [2].

³ Misidentified in the complaint as “William Broderick.” Memorandum in Support of Federal Defendants’ and United States’ Motion to Dismiss (“Federal Memorandum”) (Docket No. 8) at 2 n.4. The moving defendants assert that this court “should construe David Broderick as joining this motion,” *id.* at 1 n.1, but there is no indication in the court record as of the date of this recommended decision that Broderick has been served with the complaint and summons. Accordingly, the court cannot consider him a party to this action at this time and cannot consider him to have joined in the motion.

⁴ Identified in the complaint as “Rick Cooper.”

The complaint demands the following relief: (i) an order allowing the plaintiff to re-occupy the premises at 24 Maple Street, Milford, New Hampshire pending a jury trial; (ii) an order directing “those who moved the Tempelman’s [sic] goods out of their home, to move them back in, at their cost, replacing them as they were when they were taken away, and replacing any property which has been lost or discarded by subsequent forced entry occupiers or the buyer . . . or his agents, and to put the property back into the condition it was in when the Tempelmans were forcibly barred from re-entering it, or in a condition such as they approve without changes;” and (iii) compensatory damages. *Id.* at [2]-[3].

The complaint refers to “a related case filed in this Court” in which orders “authorizing and approving the sale of the property at the illicit auction” were entered, which orders “are being challenged under the New Hampshire Croydon decision and under US and NH Constitutional requirements for a Jury Trial for any disputed transfer of title with a value over \$20 (US) or \$1,800 (NH).” *Id.* at [2]. The complaint was initially filed in state court, and it is not clear whether a separate action is currently pending or was at any time pending in state court with respect to title to the property located at 24 Maple Street in Milford, New Hampshire. However, the case in which title to that property was involved and the federal defendants were also involved was *United States v. Tempelman*, Docket No. 98-CV-697, in the United States District Court for the District of New Hampshire, in which the United States sought to recover federal tax assessments made against Andrew D. Tempelman and Priscilla Tempelman, to set aside as fraudulent their conveyance of their interest in the property at issue and to foreclose a federal tax lien on that property. Complaint, *United States v. Tempelman*, Docket No. 98-CV-697-B, United States District Court for the District of New Hampshire (Docket No. 1). Judge Barbadoro granted the government’s motion for summary judgment in that case (*id.*, Docket No. 28) and issued an order of foreclosure by sale on the property at issue

(*id.*, Docket No. 35). Following an appeal in which the First Circuit affirmed the entry of summary judgment (*id.*, Docket No. 45), Judge Barbadoro granted the government's motion for entry of an order of ejectment (*id.*, Docket No. 51) and later granted the government's motion to confirm the sale of the property (*id.*, Docket No. 58). Ordinarily, in weighing a motion under Rule 12(b)(6), "a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). "There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Id.* (citation and internal quotation marks omitted). In this case, the records of the underlying case are official public records, they are central to the plaintiff's claim and the plaintiff does not dispute their authenticity (although he clearly disputes their validity). Therefore, I will refer to the documents and orders filed in the underlying action in making my recommended decision on the motion to dismiss.

The complaint identifies defendants Russo, Proulx, Payeur and Fallon as "of the Nashua Office, Internal Revenue Service;" and gives the addresses of defendant Colley as 10 Causeway Street, Boston, Massachusetts, Cardone as Box 55, Washington, D.C. and Broderick, DiMartino, Cooper and Smith as 55 Pleasant Street, Concord, NH 03031. Complaint at [1]. The United States Attorney for the District of New Hampshire has certified pursuant to 28 U.S.C. § 2679(d)(1) & (2) that defendants Colley, Cardone, DiMartino, Cooper, Smith, Russo, Proulx, Payeur and Fallon were acting within the scope of their employment as employees of the United States at the time of the incidents that form the basis of this action. Certification (dated May 20, 2002), included in Docket No. 1.

III. Discussion

A. Judge Barbadoro

Judge Barbadoro contends that he is entitled to dismissal of the claims against him under the doctrine of judicial immunity. Federal Memorandum at 6.

[A] federal judge may not be held accountable in damages for a judicial act taken within his court's jurisdiction. Such immunity applies however erroneous the act may have been, and however injurious its consequences may have proved to the plaintiff. Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed.

Cleavinger v. Saxner, 474 U.S. 193, 199-200 (1985) (citations and internal quotation marks omitted).

“Only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity.” *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989). The plaintiff makes no attempt to establish a clear absence of jurisdiction for the acts which the complaint alleges he undertook. Objection to Defendants' Motion to Dismiss (“Plaintiff's Opposition”) (Docket No. 10) at 2-4, 5-8. Indeed, ordering the publication of notices in connection with a court action to collect unpaid taxes, Complaint at [1], is well within the jurisdiction of a federal court. None of the actions of Judge Barbadoro alleged in the complaint, construed with reasonable inferences in favor of the plaintiff, suggests that Judge Barbadoro acted outside the court's jurisdiction. *See Stump v. Sparkman*, 435 U.S. 349, 356-64 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

The plaintiff does argue that he may nonetheless seek injunctive relief against Judge Barbadoro under 42 U.S.C. § 1983. Plaintiff's Opposition at 2, 4, 5-7.⁵ However, that statute provides relief only in circumstances where the defendants have acted under color of state law. No action under section 1983 lies against federal officials acting pursuant to federal law. *Soldevila v. Secretary of Agriculture*, 512 F.2d 427, 429 (1st Cir. 1975). The case law cited by the plaintiff involves actions

⁵ The plaintiff has filed a document entitled “Sur-Reply to Reply to Objection to Defendants' Motion to Dismiss.” Docket No. 13. The plaintiff did not seek leave to file such a memorandum, which is required by Local Rule 7.1(e)(3) of the United States District (continued on next page)

by state judges. *E.g., Olson v. Hart*, 965 F.2d 940, 943 (10th Cir. 1992). A quick review of the complaint in the underlying action reveals that it invokes only federal law. Complaint, *United States v. Tempelman*, Docket No. 98-CV-697-B, United States District Court for the District of New Hampshire. No action lies against Judge Barbadoro for injunctive relief by the terms of the complaint in this action. *See Pulliam v. Allen*, 466 U.S. 522, 541 (1984) (§ 1983 intended to reach unconstitutional state judicial action).

Judge Barbadoro is entitled to dismissal of all claims asserted against him.⁶

B. Christine Colley and John Cardone

John V. Cardone is one of the attorneys of record for the United States in the underlying action. Docket Sheet, *United States v. Tempelman*. The plaintiff does not challenge the defendants' representation that Christine Colley "is the attorney in the Office of Chief Counsel, IRS who recommended the initiation at [sic] the previous case against plaintiff." Federal Memorandum at 2 n.2. The United States Attorney for the District of New Hampshire has certified that both were acting within the scope of their employment as employees of the United States at the time of the incidents that form the basis of this lawsuit. Certification. Both contend that they have absolute immunity from the claims asserted by the plaintiff. Federal Memorandum at 6-9.

Because both of the attorney defendants in this case could only have acted pursuant to federal law, no claims may be brought against them under section 1983. Even if they could somehow be construed to have acted under color of state law, prosecutors are absolutely immune from liability under section 1983 for their conduct in initiating a prosecution and in presenting the government's

Court for the District of New Hampshire. Accordingly, the court will disregard the memorandum.

⁶ The plaintiff contends that the attorney who filed the federal defendants' motion to dismiss does not represent Judge Barbadoro and that the motion is thus void as to Judge Barbadoro. Plaintiff's Objection at 7-8. To the contrary, the attorney has properly entered his appearance on behalf of Judge Barbadoro. Letter dated June 21, 2002 from Jeremy N. Hendon to Clerk, United States District Court, Concord, New Hampshire, with enclosure (noting copy sent to plaintiff).

case. *Burns v. Reed*, 500 U.S. 478, 486 (1991). “[I]n initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit for damages under § 1983.” *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). To the extent that the complaint seeks to recover against Cardone and Colley under section 1983, they are accordingly entitled to dismissal. *See Spear v. Town of West Hartford*, 954 F.2d 63, 66 (2d Cir. 1992).

To the extent that the plaintiff seeks relief against these defendants on any other basis, it is not possible reasonably to interpret the allegations of the complaint to allege any claims against these defendants other than claims based “entirely upon their official conduct as attorneys for the government.” *Flood v. Harrington*, 532 F.2d 1248, 1250 (9th Cir. 1976). The doctrine of absolute immunity protects attorneys “if their allegedly improper conduct was intimately associated with the judicial phases” of litigation concerning federal tax liability. *Id.* at 1251 (citation and internal quotation marks omitted). From all that appears in the complaint, nothing beyond such conduct by Colley and Cardone is alleged here. They are entitled to dismissal of all claims asserted against them. *Fry v. Melaragno*, 939 F.2d 832, 836 (9th Cir. 1991); *Barrett v. United States*, 798 F.2d 565, 571-72 (2d Cir. 1986).

C. Gary DiMartino, Richard Cooper and Meaghan Smith

At all relevant times, DiMartino was the chief deputy United States marshal in Concord, New Hampshire and Cooper and Smith worked in the United States Marshal’s Service. Federal Memorandum at 2 n.3; Plaintiff’s Attachment to Writ of Summons, included in Docket No. 1 (listing address of these defendants as “US Marshals Office, 55 Pleasant Street, Concord, NH”). These defendants seek dismissal based on absolute immunity, contending that they acted at all times within the scope of their authority carrying out facially valid court orders. Federal Memorandum at 9-10. To the extent that the claims against these defendants arise out of the execution of court orders, their

position is well taken. *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980); *see also Mays v. Sudderth*, 97 F.3d 107, 113 (5th Cir. 1996). The complaint asserts that these defendants engaged in the following activities which caused the plaintiff damage: conspiracy to commit libel, the only libel alleged being the publication of “the known falsehood” that the plaintiff owed back taxes; violation of the Fourth Amendment, which prohibits unreasonable search and seizure; denial of a jury trial before transfer of title to property;⁷ conspiracy to deprive the plaintiff of unspecified rights and property; fraud and conspiracy to commit fraud; and “conspiracy to deprive of property in order to punish for the plaintiff’s views of the IRS as admitted in certain writings by these perpetrators.” Complaint at [1]. None of these claims can reasonably be construed to arise out of anything other than the seizure of the plaintiff’s property, which took place at the order of the court.⁸ Accordingly, these defendants are entitled to dismissal of the claims asserted against them in the complaint.

D. Paul Proulx, Maria Russo, Marc Payeur and Joseph Fallon

The remaining federal defendants were employees of the Internal Revenue Service at all relevant times. Federa; Memorandum at 2 n.2; Plaintiff’s Attachment to Writ of Summons (listing address of these defendants as “IRS Office, 410 Amherst Street, Birch Pond Entrance, Nashua NH”). These defendants contend both that the complaint fails to state a claim against them under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and that they are entitled to qualified immunity from the plaintiff’s constitutional claims. Federal Memorandum at 10-22. Of course, these defendants, like the employees of the Marshals Service, do

⁷ Of course, these defendants had no power to grant or deny the plaintiff a jury trial.

⁸ In addition, to the extent that the complaint may reasonably be construed to allege a cause of action under 42 U.S.C. § 1983 against these defendants, they could only have been acting under color of federal rather than state law. Relief under section 1983 is not available in these circumstances. *Rogers v. Vicuna*, 264 F.3d 1, 4 (1st Cir. 2001).

not have the power to grant or deny anyone a jury trial, and any Seventh Amendment claim asserted against them must be dismissed.⁹

Bivens actions for money damages against federal officers have been allowed in limited circumstances where “there were no special factors counselling hesitation in the absence of affirmative action by Congress, no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy.” *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (citation and internal quotation marks omitted). “When the design of a Government program suggests that Congress has provided what it considers adequate mechanisms for constitutional violations that may occur in the course of its administration,” no *Bivens* remedy is provided. *Id.* at 423. That is the case with the administration of federal taxation by the Internal Revenue Service. *National Commodity & Barter Ass’n v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989) (alleged Fifth Amendment violations); *Baddour, Inc. v. United States*, 802 F.2d 801, 807-09 (5th Cir. 1986) (alleged Fourth and Fifth Amendment violations). Specific statutory remedies for overzealous tax collection efforts are provided by 26 U.S.C. §§ 7432-33. Those remedies are sufficient to bar *Bivens* claims against individual employees of the Internal Revenue Service. *McMillen v. United States Dep’t of Treasury*, 960 F.2d 187, 190 (1st Cir. 1991).

Any claims asserted against these defendants that could not properly be construed as *Bivens* claims are barred by the substitution of the United States as a party pursuant to the certification of the United States Attorney. The relevant statute provides:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon

⁹ Even if that were not the case, summary judgment was granted to the government in the underlying action, Docket Sheet, *United States v. Tempelman*, at 6. The Seventh Amendment is not violated by the entry of summary judgment. *Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001). There is no right to jury trial on a motion for foreclosure and sale. *Mile High Indus. v. Cohen*, 222 F.3d 845, 856 (10th Cir. 2000).

such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). The attorney general has delegated the authority to issue such certifications to United States attorneys. 28 C.F.R. § 15.3(a).

Here, the plaintiff challenges the certification on two grounds: that the United States Attorney “has certified falsely that the defendants were operating ‘within the scope of their employment’” and that he “is a known liar.” Plaintiff’s Opposition at 5. To contest the propriety of substitution based on a certification issued pursuant to section 2679, a plaintiff must produce evidence that demonstrates that each such employee was not in fact acting within the scope of his or her employment. *Singleton v. United States*, 277 F.3d 864, 871 (6th Cir. 2002); *Larsen v. Frederiksen*, 277 F.3d 1040, 1041 (8th Cir. 2002). A claim that the certifier is “a known liar” is irrelevant to this determination. The plaintiff’s conclusory, unsworn statement that the certification is false, without more, is not evidence. Further, the complaint itself pleads conduct by the federal defendants that would be within the scope of their employment; under these circumstances, regardless of allegations of bad motives, summary dismissal of a challenge to the certification is warranted. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1143-44 (6th Cir. 1996).

Accordingly, no claims remain against the individual IRS defendants and it is not necessary to reach their claim of qualified immunity.

E. The United States and Government Agencies

The complaint asserts that its claims are brought against the individual defendants and “the gov’t agencies which employed them.” Complaint at [1]. With respect to such claims and the claims for which the United States has been substituted as a defendant, no claims may be asserted pursuant to 42 U.S.C. § 1983, *Hindes v. FDIC*, 137 F.3d 148, 158 (3d Cir. 1998) (federal agencies);

International Islamic Cmty. of Masjid Baytulkhaliq, Inc., 981 F. Supp. 352, 364 (D. V.I. 1997) (United States), *aff'd* 176 F.3d 472 (3d Cir. 1998), or *Bivens, Mooney v. Clerk of Courts*, 831 F. Supp. 7, 10 (D. N.H. 1993). Any other claims are governed by the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2671 *et seq.* *United States v. Smith*, 499 U.S. 160, 165-66 (1991). “Tort claims against the United States must be presented to the appropriate federal agency pursuant to § 2675(a) of the FTCA.” *United States v. Berk & Berk*, 767 F. Supp. 593, 603 (D. N.J. 1991). This is a jurisdictional requirement. *Id.* The complaint fails to allege that the plaintiff has complied with this exhaustion requirement and any tort claims must therefore be dismissed. Even if that were not the case, the United States is not answerable in tort for actions arising out of the assessment or collection of federal taxes. 26 U.S.C. § 2680(c).

F. State Law Claim

The complaint also alleges “Civil Rights violations of . . . Croydon constraints” by the federal defendants. Complaint at [1]. This is an apparent reference to *Thomas Tool Servs., Inc. v. Town of Croydon*, 761 A.2d 439 (N.H. 2000), in which the New Hampshire Supreme Court held that an alternative procedure for collecting state taxes under New Hampshire state law violated the New Hampshire constitution, *id.* at 441-42. The federal defendants in this case could not possibly have been involved in the collection of state taxes, and the complaint in the underlying action deals only with federal tax liability. The state statute at issue in *Croydon* did not and could not purport to govern the assessment or collection of federal taxes. Accordingly, the complaint fails to state a claim upon which relief may be granted against any of the moving defendants on this basis.

IV. Conclusion

For the foregoing reasons, I recommend that the motion to dismiss of the federal defendants presently before the court in this action be **GRANTED**.¹⁰

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of August, 2002.

David M. Cohen
United States Magistrate Judge

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plaintiff

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¹⁰ The complaint also states that “[t]hese gov’ts and their agents are also charged with Civil Rights abuses under Amendment IV, US Constitution, with using this Libel to engage in Homeland Terrorism of other citizens through the media” Complaint at [1]. The plaintiff lacks standing to bring a claim on behalf of any otherwise-unidentified “other citizens,” and all such claims are also subject to dismissal.

