

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WAYNE M. JOHNSON,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 96-284-P-H
)	
UNITED STATES OF AMERICA,)	
<i>et al.,</i>)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS’ MOTIONS TO DISMISS AND
MEMORANDUM DECISION ON DEFENDANT UNITED STATES’ MOTION
TO SUBSTITUTE PARTIES**

The defendants, the United States of America, the United States Department of Housing and Urban Development, the City of Portland, James Joyce, David LaFond, and Marge Schmuckal, move to dismiss this action, which is brought by a second amended complaint in eighteen counts, arising out of real estate acquisition and renovation projects for which federal financial assistance was sought between 1986 and 1988. The United States moves to substitute itself as a defendant in place of defendants Joyce and LaFond. For the reasons that follow, I grant in part the motion to substitute parties and recommend that the court grant the motions to dismiss.

I. Standards for Review of Motions to Dismiss

All defendants have moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6). “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they

appear in the complaint, extending the plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

II. Factual Background

The second amended complaint (Docket No. 24) sets forth the following factual assertions that are relevant to the disposition of the pending motions. Defendants Joyce and LaFond are employees of the defendant Department of Housing and Urban Development (“HUD”). Second Amended Complaint ¶¶ 7-9. Defendant Schmuckal is an employee of the defendant City. *Id.* ¶ 6. From 1986 to 1988, the plaintiff joined with three other individuals to form partnerships to rehabilitate and renovate real estate in Maine through a HUD funding program known as Section 312. *Id.* ¶¶ 11, 16-20. The defendant City delayed approval of the renovation of certain apartment properties by one or more of the defendant’s partnerships, thereby delaying their applications for Section 312 funding, causing “defaults to occur in the payment of mortgage obligations.” *Id.* ¶ 21.

The applications for Section 312 funding for these properties were submitted to HUD by defendant Schmuckal in September 1988. *Id.* ¶¶ 22-23. HUD did not approve the applications. *Id.* ¶ 24. Joyce knew that HUD had made commitments for Section 312 loans in excess of the amount of funds available, but did not inform the plaintiff of this fact. *Id.* ¶ 25. One of the reasons for this shortfall was the approval by HUD of a Section 312 loan for the Atrium Project in Saco, Maine, to which defendant Schmuckal served as a consultant. *Id.* ¶¶ 6, 26. Defendant Joyce also informed the plaintiff’s partners that he would not approve Section 312 loans for projects in which the plaintiff

was involved. *Id.* ¶ 24. This was due to the plaintiff's affiliation with the Republican Party. *Id.* ¶ 27.

The plaintiff and his partners had obtained bridge loans from Maine Savings Bank, with the assistance of defendant Schmuckal,¹ in anticipation of the Section 312 funds. *Id.* ¶ 31. These loans went into default, and judgment was entered against the plaintiff in 1991 on his personal guarantee of these loans in a foreclosure action in state court entitled *Maine Savings Bank v. D'AMBRA Mercantile Enter., Inc.*, Maine Superior Court (Cumberland County), Docket No. 89-483-P-C. *Id.* ¶ 32. On April 28, 1989, the plaintiff wrote to the HUD area manager for Region I requesting an investigation of Joyce's conduct. *Id.* ¶ 36. Defendant LaFond responded in a letter received by the plaintiff on May 16, 1989, that after review of the matters set forth in the plaintiff's letter, HUD had found no corroborative evidence and would take no further action. *Id.* ¶ 37. The plaintiff again requested an investigation by letter dated May 19, 1990, to the office of HUD's inspector general in Boston. *Id.* ¶ 40. HUD has taken the position that its investigative file pertaining to this request is exempt from disclosure. *Id.* ¶ 50.

In 1994, the United States brought an action in this court against the plaintiff and his partnerships to collect on other Section 312 loans that had gone into default because the applications for such loans at issue in this action had not been approved. *Id.* ¶¶ 48, 53; *see United States v.*

¹ In subsection 10 of Count XIII of the memorandum of law that is incorporated in the second amended complaint, the plaintiff alleges that defendant Schmuckal engaged in fraud and conspiracy to violate RICO by giving an interview to the *Maine Times* in which she blamed the plaintiff for the Section 312 failure and denigrated and ruined his business reputation. Second Amended Complaint, Incorporated Memorandum of Law in Support of Plaintiff's Claims, Count XIII, Subpart 10, ¶ 4. The plaintiff's Claim for Damage, Injury or Death that was submitted to HUD indicates that this interview was published on March 15, 1991. Claim for Damage, Injury or Death (September 16, 1995), Attachment [2] to second amended complaint, at item 10, p.2.

Portland-Parris Street Assoc., Docket No. 94-300-P-H. On September 23, 1995, the plaintiff filed an administrative claim against HUD, a copy of which is attached to the second amended complaint. Second Amended Complaint ¶ 54. This claim was denied by letter dated April 1, 1996. *Id.* ¶ 55. As a result of the collection action, the United States on July 19, 1996, placed liens on real estate owned by the Plaintiff. *Id.* ¶¶ 56-57.

The second amended complaint alleges the following claims for relief: denial of right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution (Count I); unconstitutional taking of property, denial of equal protection of the laws under the Fifth and Fourteenth Amendments, and unconstitutional discrimination (Count II); denial of the right of assembly under the First Amendment by excluding the plaintiff from participation in the Atrium Project (Count III); unconstitutional nature of certain sections of the Federal Tort Claims Act (Count IV); negligence in failing to follow statutory rules of conduct and failing to properly investigate the plaintiff's complaints (Count V); breach of contract (Count VI); breach of fiduciary duty (Count VII); constructive trust (Count VIII); intentional infliction of emotional distress (Count IX); negligent infliction of emotional distress (Count X); violation of the Good Samaritan doctrine (Count XI); conversion (Count XII); unfair trade practices, illegal restraint of trade, and violation of the Sherman Antitrust, Robinson-Patman and Clayton Antitrust Acts (Count XIII); violation of several Maine criminal statutes (Count XIV); mail and wire fraud, violation of the Travel Act, and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (Count XV); invasion of privacy (Count XVI); injunctive relief against the liens on the plaintiff's property (Count XVII); and equitable tolling (Count XVIII).

III. Analysis

A. Motion to Substitute Parties

The United States bases its motion to substitute itself for defendants Joyce and LaFond in this action on 28 U.S.C. § 2679(b), a section of the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2671 *et seq.*, which provides that a suit against the United States shall be the exclusive remedy for torts allegedly caused by any federal employee. Under section 2679(d)(1), upon certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the claim arose, the action shall be deemed an action against the United States and the United States shall be substituted for the employee as a party. The exclusive remedy does not apply to actions alleging a violation of the United States Constitution or a federal statute under which action against an individual is otherwise authorized. 28 U.S.C. § 2679(b)(2). The Attorney General has delegated her certification authority under this statute to the United States attorneys. 28 C.F.R. § 15.3(a).

The United States Attorney for the District of Maine has certified that Joyce and LaFond were acting within the scope of their federal employment at the time of the conduct alleged by the plaintiff as the basis for his claims. Certificate of Scope of Employment, attached to United States’ Motion to Dismiss and Substitute and Incorporated Memorandum of Law (Docket No. 28). This certification is provisional and subject to judicial review. *Aversa v. United States*, 99 F.3d 1200, 1208 (1st Cir. 1996). The scope of the individual defendants’ employment is to be determined under the law of the state in which the alleged tortious conduct occurred. *Kelly v. United States*, 924 F.2d 355, 357 (1st Cir. 1991).

The plaintiff at first appears to agree to the requested substitution, while noting the statutory

exclusions. Plaintiff's Opposition to Defendant's Motion to Dismiss and Motion to Substitute (Docket No. 30) at 4. However, he then refers to two reported cases in which federal circuit courts of appeals found that specific employees were acting outside the scope of their employment and suggests that because defendant Joyce engaged in unspecified "damaging conduct towards Plaintiff" while "downing a few beers in the conference room at 47 Portland Street," *id.* at 4-5, substitution of the United States for Joyce should not occur at this time. This alleged incident does not appear in the amended complaint, nor are there any documented facts in the record to support the assertion. *See Kelly*, 924 F.2d at 357 (for purpose of determining whether individual defendant was acting within scope of his employment, "[r]hetoric, unsupported by facts, remains only rhetoric, even if stridently proclaimed"). Neither the amended complaint nor the plaintiff's opposition to the motion to substitute offers any colorable evidence to controvert the certification.

Therefore, the motion to substitute the United States as a defendant for Joyce and LaFond is granted as to all counts of the amended complaint except Counts I - III, which allege constitutional violations.

B. Motions to Dismiss

1. Statutes of Limitation

Section 2401(a) of Title 28 of the United States Code provides, in relevant part: "Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, is not applicable to the plaintiff's claims. Any of the plaintiff's claims against the United States and HUD which assert rights of action accruing before September 30, 1990, the date six years before he filed his original complaint in this

action (Docket No. 1), are therefore untimely. In determining when a claim accrues for this purpose, the court must apply the law of the state where the claim arose. *Hau v. United States*, 575 F.2d 1000, 1002 (1st Cir. 1978). Under Maine law, a cause of action accrues at the time when a wrongful act produces injury, except in cases of certain types of medical malpractice. *Cloutier v. Dalkon Shield Claimants Trust*, 152 B.R. 1, 2 (D. Me. 1993); *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc.*, 659 A.2d 267, 272 (Me. 1995). The plaintiff's claims primarily arise out of actions by the defendants undertaken in 1986 through 1988. It is clear that the plaintiff was aware of his claimed injuries by April 28, 1989, when he wrote to HUD's area manager, James Barry. Attachment [20] to Second Amended Complaint.

The plaintiff asserts in Count XVIII of the second amended complaint that all statutes of limitation that might otherwise be applicable to the claims he raises should be equitably tolled because HUD misled him by stating that it had carried out an extensive review in response to his 1989 complaint, *id.* ¶ 148; the defendants deliberately concealed information from him, *id.* ¶ 151; and there has been a delay in responding to his request for a copy of the investigative report, *id.* ¶ 152. None of these assertions provides a basis for equitable tolling as a matter of law.

Equitable tolling is most often invoked in cases characterized by affirmative misconduct by the party against whom it is employed. *Kelley v. NLRB*, 79 F.3d 1238, 1248 (1st Cir. 1996). Courts weigh five factors in assessing claims for equitable tolling:

- (1) lack of actual notice of the filing requirement;
- (2) lack of constructive knowledge of the filing requirement;
- (3) diligence in pursuing one's rights;
- (4) absence of prejudice to the defendant; and
- (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement.

Kale v. Combined Ins. Co. of America, 861 F.2d 746, 752-53 (1st Cir. 1988) (citations omitted). "It

is axiomatic that the grounds for tolling statutes of limitations are more limited in suits against the government.” *Kelley*, 79 F.3d at 1248 (citation and internal quotation marks omitted). Application of equitable tolling is appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands. *Id.*

Here, the plaintiff is an attorney. Constructive knowledge of the relevant statutes of limitations is imputed to him. *Kelley*, 79 F.3d at 1249. The plaintiff’s allegations of misleading conduct by the defendants relate only to whether an investigation was being pursued and do not relate at all to the applicable deadlines for bringing an action in court. *See Wilson v. United States Government*, 23 F.3d 559, 561 (1st Cir. 1994) (equitable tolling may be invoked where complainant tricked by adversary’s misconduct into allowing deadline to pass). An investigation by HUD of the plaintiff’s complaint was not a legal prerequisite to suit. According to his own pleadings, the plaintiff at all times retained the ability to file suit; the circumstances that caused him to miss any filing deadline were not beyond his control. If he was not actually aware of the existence of statutes of limitation applicable to his claims, as a lawyer he is charged with knowing where to look to find them.

Therefore, all claims asserted in the second amended complaint against the United States and HUD are barred by 28 U.S.C. § 2401(a). To the extent that any of those claims may be construed to arise out of the alleged failure of HUD to provide the plaintiff with a copy of its investigative report concerning his complaints, 5 U.S.C. § 552(a)(4)(B), which he has not invoked in this action, provides the sole avenue for judicial review.

The plaintiff’s constitutional claims against the defendant federal employees, Joyce and LaFond, set forth in Counts I - III of the second amended complaint, are also untimely. Victims of

a constitutional violation by a federal employee have a right to recover damages in federal court despite the absence of any statute conferring such a right. *Carlson v. Green*, 446 U. S. 14, 18 (1980); *Morales v. Ramirez*, 906 F.2d 784, 786 (1st Cir. 1990). The statute of limitations applicable to such claims, for which Congress has not established a time limitation, is the most analogous state statute of limitations. *Small v. Inhabitants of the City of Belfast*, 796 F.2d 544, 545 (1st Cir. 1986). For claims arising in Maine, that statute is the one applicable to claims for personal injuries found in 14 M.R.S.A. § 752. *Id.* at 546; *McKenney v. Greene Acres Manor*, 650 A.2d 699, 701 (Me. 1994). Section 752 also imposes a six year statute of limitations, thus causing the claims against the individual federal defendants to be barred as well.²

The limitations bar of section 752 also applies to the claims against the municipal defendants, and to the state law claims asserted against all defendants (Counts VI, VII, IX, X, XII and XIV). In addition, the Maine Tort Claims Act, 14 M.R.S.A. § 8101 *et seq.*, immunizes the municipal defendants against the state law claims asserted in the second amended complaint. 14 M.R.S.A. §§ 8103(1), 8111(1). In addition, the statute of limitations for tort claims that may be asserted against such defendants requires that an action be brought within two years after the cause of action accrues. 14 M.R.S.A. § 8110. The City and Schmuckal are entitled to dismissal of the claims against them under the applicable statutes of limitations.

² Many of the plaintiff's specific claims are also barred by shorter statutes of limitations applicable to only those claims. *E.g.*, the two-year limitation for filing of claims under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), which is applicable to the claims against the federal defendants raised in counts V, VII, IX, X, XI and XVI; the four-year statute of limitations for RICO actions, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), which applies to some of the claims raised in Count XV; the four-year statute of limitations for anti-trust actions, 15 U.S.C. § 15b, which applies to the claims raised under the Sherman, Clayton and Robinson-Patman Acts (Count XIII).

2. *Failure to State a Claim Upon Which Relief May be Granted.*

In addition to the bar of the statute of limitations, the claims asserted in the second amended complaint are substantively deficient in most cases.

First, this court lacks jurisdiction over the takings claim (Count II), the claims of violations of federal statutes (Count V) and the breach of contract claim (Count VI) asserted against the federal defendants in the second amended complaint. The Court of Claims has exclusive jurisdiction over those claims, which exceed \$10,000 by the terms of the second amended complaint. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

Next, 28 U.S.C. § 2680(h) precludes any action against the federal defendants for “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” At a minimum, the plaintiff’s claims of fraud in Count XV and his claims of infliction of emotional distress in Counts IX and X, which are based on allegations of libel, slander, misrepresentation, deceit and interference with contract rights, are within this group of claims to which absolute immunity applies. See *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1206 (9th Cir. 1988) (negligent infliction of emotional distress); *FDIC v. diStefano*, 839 F. Supp. 110, 121 (D. R. I. 1993) (conspiracy to defraud). In addition, 28 U.S.C. § 2679(b)(1) provides the individual federal defendants with immunity against the state tort claims asserted in this action. *Barton v. American Red Cross*, 829 F. Supp. 1290, 1310 (M. D. Ala. 1993), *aff’d* 43 F.3d 678 (11th Cir. 1994).

The plaintiff’s claim in Count IV that the FTCA is unconstitutional on equal protection grounds must also fail. The plaintiff does not allege that he is a member of a suspect class, nor does he present factual allegations that would allow a court to infer such status. He has no fundamental

right to bring suit for injuries caused by government employees. *Miller v. United States*, 73 F.3d 878, 881 (9th Cir. 1995). There is clearly a rational basis for the immunities and procedures set out in the FTCA. *E.g., id.* at 882 (foreign country exception to FTCA). In addition, Congress has the absolute power to remove a right to sue the government. *Heller v. United States*, 776 F.2d 92, 98 (3d Cir. 1985). See also *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 988-92 (9th Cir. 1987) (substitution of remedy under FTCA for state law claims does not violate Fifth Amendment due process or takings clauses).

The plaintiff asserts claims against the defendants for violation of various federal and Maine criminal statutes in Counts V, XIV and XV. There is no private cause of action under any of these statutes.

When a federal statute does not expressly authorize a private right of action by a person injured in violation of that statute, the courts may infer the existence of a private remedy only after considering four factors.

First, is the plaintiff “one of the class for whose *especial* benefit the statute was enacted,” — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U. S. 66, 78 (1975) (citations omitted). The Supreme Court “has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large.” *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 n.13 (1979).

None of the federal criminal statutes invoked by the plaintiff expressly authorizes a private

right of action. None of these statutes meets the *Cort* standard. Sections 602, 603 and 607 of Title 18 deal with the solicitation and making of political contributions by federal employees. Each statute provides a criminal penalty. None creates a federal right in favor of a particular class of which the plaintiff is a member. The same is true of 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud) and § 1952(a) (interstate travel with criminal intent).³

As to the claims based on state criminal statutes, legislative intent governs the question whether a private cause of action should be judicially implied from a statute that does not expressly authorize such relief. *Larabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 101 (Me. 1984) (also adopting *Cort* standard). If such a right is not expressly created by the statute, the legislative intent to do so must appear in the legislative history. *Id.* None of the Maine criminal statutes upon which the plaintiff relies expressly authorize a private cause of action, and he has not provided the court with any citation to legislative history demonstrating an intent to create one. Indeed, one of the Maine statutes cited in the second amended complaint, 17 M. R. S. A. § 3701, was repealed in 1976, and another, 17-A M. R. S. A. § 1161 *et seq.*, does not exist. The remaining criminal statutes,⁴ 17-A M. R. S. A. § 606 (improper compensation for services), § 608 (official oppression) and § 901 *et seq.* (fraud), all provide criminal penalties for violation and do not create a right in favor of a particular class of which the plaintiff is a member. The plaintiff has no private cause of action under these

³ The plaintiff also has no private cause of action under the federal civil statutes that he cites in these counts, for similar reasons. *See* 5 U.S.C. §§ 7321-27 (employee political activity) and 31 U.S.C. § 3711 (collection of claims of the United States). Two federal statutes cited by the plaintiff as grounds for his claims, 28 U.S.C. § 633(2)(b) and 42 U.S.C. § 1452(b), do not exist.

⁴ The plaintiff also relies on civil statutes, 10 M. R. S. A. §§ 1101, 1102-A, 1103, and 1104, dealing with restraint of trade and monopoly. Section 1103 was repealed in 1991. Section 1104(1) does create a private right of action, but the six-year statute of limitations established by 14 M. R. S. A. § 752 also bars this claim.

state statutes.

Finally, the plaintiff seeks only certain remedies in Counts VIII and XVII. In the absence of any viable claim for relief, these counts must also fail.

IV. Conclusion

For the foregoing reasons, the federal defendants' motion to substitute is **GRANTED** as to Counts IV-XVIII of the second amended complaint and otherwise **DENIED**. I recommend that the defendants' motions to dismiss be **GRANTED**.

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 ____ day of April, 1997.

David M. Cohen
United States Magistrate Judge