UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JULIO TRUJILLO SANTOYO,

Plaintiff,

v.

UNITED STATES OF AMERICA et al.,

Defendants.

Civil No. 5:16-CV-855-OLG

ORDER

This case is before the Court on the Motion for Reconsideration of the Court's Order of June 5, 2017, submitted by Defendant Bexar County (docket no. 43); the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) submitted by the federal Defendants[1] (docket no. 45); the Motion to Stay Discovery and Scheduling Order Deadlines submitted by the federal Defendants (docket no. 46); and the Motion to Compel submitted by Plaintiff (docket no. 52).

A separate case also pending before this Court, *City of El Cenizo v. Texas*, SA-17-CV-404-OLG, poses questions similar to those raised by Defendant Bexar County's Motions for Reconsideration regarding the Fourth Amendment consequences of a policy of blanket fulfillment of ICE detainer requests. In that case, this Court entered a preliminary injunction based in part upon a finding that such a policy likely violates the Fourth Amendment. *City of El Cenizo v. Texas*, SA-17-CV-404-OLG, 2017 WL 3763098, at *28-*35 (W.D. Tex. Aug. 30, 2017). On September 25, 2017, the United States Court of Appeals for the Fifth Circuit stayed

[1] For purposes of this Order, the federal Defendants include the Department of Homeland Security (DHS), Acting U.S. Immigration and Customs Enforcement (ICE) Director Thomas D. Homan, and ICE San Antonio Field Office Director Daniel Bible. Two additional ICE-affiliated officers were named as Defendants in this case: former San Antonio Field Office Director Enrique Lucero and ICE Officer Leonard Davis, both of whom Plaintiff sued in their individual capacities. Docket no. 11 at ¶¶ 17-18. Plaintiff has voluntarily dismissed the *Bivens* claims he initially asserted against the individual ICE defendants. Docket no. 26.

this Court's injunction as to the state law requirement that localities "comply with, honor, and fulfill" ICE detainer requests. *City of El Cenizo v. Texas*, 17-50762, 2017 WL 4250186, at *2 (5th Cir. Sept. 25, 2017). The underlying appeal of the injunction remains pending before the Fifth Circuit, and, as of this Order, it remains possible that further rulings from the Fifth Circuit may establish new controlling authority that is relevant to Plaintiff's claims against Bexar County in this case. The Court therefore defers a ruling on the motion for reconsideration at this time.

The Court finds that the motion to dismiss should be granted, and the remaining motions should be denied as moot.

Background

Plaintiff asserts claims under 42 U.S.C. § 1983 for violations of the Fourth, Fifth, and Fourteenth Amendments; claims for declaratory relief under 28 U.S.C. §§ 2201 and 2202; and claims for violations of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1226(a) and 1357(a)(2) and (d), all arising from his detention at the Bexar County Adult Detention Center (BCADC) from March 24, 2016, to June 7, 2016. Docket no. 11 at 1 & ¶¶ 54-86. Plaintiff asserts these claims against the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), and Bexar County.

Federal Defendants' Motion to Dismiss (docket no. 45)

The federal Defendants have moved to dismiss Plaintiff's claims against them pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Plaintiff has asserted three claims against the federal Defendants: a claim that the federal Defendants issued the detainer request against him in violation of 8 U.S.C. §§ 1226(a), 1357(a)(2), and 1357(d), docket no. 11 at ¶¶ 71-76; a claim that "ICE detainers should be declared unconstitutional since they constitute a warrantless seizure in violation of the Fourth Amendment" and because "they violate detainees' due process rights in

violation of the Fifth Amendment[,]" docket no. 11 at ¶¶ 77-79; and a false imprisonment claim asserted under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b)(1), 2674, 2680(h), 5:17-cv-54-OLG, docket no. 1 at ¶¶ 44-51.

The federal Defendants argue that, for several reasons, this Court lacks subject matter jurisdiction over Plaintiff's claim. They argue first that Plaintiff's claims are barred by sovereign immunity. Docket no. 45 at 9-10. Next, they argue that the Court lacks subject matter jurisdiction over Plaintiff's false imprisonment claim based on the holding, in *Heck v. Humphrey*, 512 U.S. 477 (1994), that "a civil tort action, including an action under section 1983, is not an appropriate vehicle for challenging the validity of outstanding criminal judgments." Docket no. 45 at 10-11; *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 652 (5th Cir. 2007) (discussing *Heck*, noting that "[w]hen a plaintiff alleges tort claims against his arresting officers, the district court must first consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence. If so, the claim is barred" except in circumstances not relevant here (internal quotation marks omitted)). Next, the federal Defendants argue that sections of the INA that prohibit District Court review of certain civil removal actions also prohibit review by this Court of "the issuance of or effect of immigration detainers." Docket no. 45 at 11-15. Finally, they argue that Plaintiff's false imprisonment claim is specifically barred by the exception to the FTCA's waiver of sovereign immunity for discretionary functions. Docket no. 45 at 15-17.

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to move for dismissal where the Court lacks subject matter jurisdiction over the case. Subject matter jurisdiction is lacking when the claims against a Defendant are barred by sovereign immunity. *Linkous v. United States*, 142 F.3d 271, 275 (5th Cir. 1998). "The party asserting jurisdiction has

the burden of proof." *United States v. Renda Marine, Inc.*, 667 F.3d 651, 654 (5th Cir. 2012).[2] In evaluating the existence of subject matter jurisdiction, the Court may consider the complaint alone, the complaint supplemented by undisputed facts, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Robinson v. TCI/US W. Commc'ns Inc.*, 117 F.3d 900, 904 (5th Cir. 1997). A motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. May 1981).

In reviewing a motion under Fed. R. Civ. P. 12(b)(6), the Court must first identify the complaint's factual allegations, which are assumed to be true, and distinguish them from any statements of legal conclusion, which are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 680-81 (2009). Second, the Court must assess whether the assumed-as-true factual allegations set forth a plausible claim to relief. This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense" to determine whether "the well-pleaded facts . . . permit the court to infer more than the mere possibility of misconduct[.]" *Iqbal*, 556 U.S. at 679. Ultimately, the claim is subject to dismissal if it lacks "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. When, as here, the Court is presented with both a motion under Rule 12(b)(1) challenging the Court's subject matter jurisdiction and other Rule 12 motions, the Court should determine the existence of subject matter jurisdiction before

[2] Specifically, when the question of subject matter jurisdiction turns on the scope of the discretionary function exemption to the FTCA's waiver of sovereign immunity, the plaintiff at the pleading stage "must invoke the court's jurisdiction by alleging a claim that is facially outside of the discretionary function exception[,]" although it is less clear whether at successive stages the burden shifts to the government to establish the applicability of the exception. *St. Tammany Par., ex rel. Davis v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 315 & n.3 (5th Cir. 2009); *Gibson v. United States*, 809 F.3d 807, 811 n.1 (5th Cir. 2016).

proceeding to other arguments for dismissal. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

The FTCA "waives sovereign immunity for many torts committed by federal employees[,]" but not when the allegedly tortious acts involve the exercise of judgment or choice by the federal employee. *Tsolmon v. United States*, 841 F.3d 378, 380 (5th Cir. 2016) (citing *United States v. Gaubert*, 499 U.S. 315, 322 (1991); discussing discretionary function exception to FTCA's waiver of sovereign immunity, under 26 U.S.C. § 2680(a)). The discretionary functions as to which the FTCA does not waive immunity include "decisions on when, where, and how to investigate and whether to prosecute" immigration offenses. *Tsolmon*, 841 F.3d at 383. The Court agrees with the federal Defendants that, just as the issuance of a Notice to Appear in *Tsolmon* was classified as a discretionary function even though it triggered a detention that was mandatory under agency policy, 841 F.3d at 382-83, the issuance of the detainer request in this case was a discretionary function. The statutory and regulatory authorities that regulate the issuance of ICE detainer requests do not mandate their issuance, but provide that defined categories of officers may issue them when, in the officer's judgment, certain circumstances are present. *See, e.g.*, 8 U.S.C. § 1357(d); 8 C.F.R. § 287.7(a) (authorized immigration officer "may" issue detainer request form); *Ernesto Javier De La Cruz-Flores v. United States*, SA-16-CV-707-RCL, 2017 WL 4276812, at *6 (W.D. Tex. Sept. 25, 2017).

Plaintiff nonetheless argues, relying upon *Tsolmon*, that issuance of the detainer in this case falls outside the discretionary function exemption because the officers "acted unlawfully and unconstitutionally, which they have no discretion to do[,]" by issuing a detainer request that was not predicated upon an arrest for a controlled substance offense or an individualized finding of likelihood of escape before a warrant could be issued. Docket no. 50 at 12-13, 21. However, as this Court recently observed in *El Cenizo*, 8 U.S.C. § 1357(d), which Plaintiff contends

restricts the issuance of detainer requests to arrests for controlled substance violations, merely references and establishes special requirements for detainer requests in those cases, but does not limit the use of detainers in the context of arrests for offenses not involving controlled substances. *El Cenizo*, 2017 WL 3763098, at *30 n.71. Although no other provision of the INA specifically authorizes the issuance of detainer requests, that authority predates the INA and has long been viewed as implied by federal immigration enforcers' authority to arrest those suspected of being removable.[3] Plaintiff also contends that the detainer was illegal and therefore not a discretionary function because ICE failed to adequately assess whether he was a flight risk, relying upon a generalized determination that "criminal aliens flee after release from jail and do not voluntarily report to ICE" rather than undertaking an individualized assessment as required by 8 U.S.C. § 1357(a)(2). Docket no. 50 at 13. However, the Court in *Tsolmon* held that "officers are unprotected only when they use their discretion to act in violation of a statute or policy that specifically directs them to act otherwise." *Tsolmon*, 841 F.3d at 384. The discretionary function exception still covers officers who arguably misapply a rule that leaves "room for policy judgment or decision[,]" such as the "judgment-laden 'reasonable belief' standard" of 8 U.S.C. § 1357(a)(2).[4] *Tsolmon*, 841 F.3d at 384.

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[3] *Comm. for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F. Supp. 2d 1177, 1199 (N.D. Cal. 2009); *see also Ex parte Korner*, 123 P.2d 111, 112 (Cal. Dist. Ct. App. 1942) (referencing use of INS detainers); *Slavik v. Miller*, 89 F. Supp. 575, 576 (W.D. Pa. 1950), *aff'd*, 184 F.2d 575 (3d Cir. 1950) (same); *Chung Young Chew v. Boyd*, 309 F.2d 857, 865 (9th Cir. 1962) (same).

[4] Since Plaintiff's allegations do not show that the federal Defendants engaged in intentional misconduct or acted with bad faith, the FTCA's "law enforcement proviso," 28 U.S.C. § 1680(h), also does not establish the waiver of sovereign immunity. *See, e.g.*, *Ernesto Javier De La Cruz-Flores*, 2017 WL 4276812, at *4 (discussing interaction between discretionary function exception and law enforcement proviso under Fifth Circuit law); *Campos v. United States*, 226 F. Supp. 3d 734, 742 (W.D. Tex. 2016).

The Court therefore concludes that Plaintiff has failed to show that sovereign immunity does not bar his false imprisonment claim, for which he seeks compensatory damages, and that that claim should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiff also asserts statutory claims, for which he seeks compensatory damages, docket no. 11 at ¶¶ 74-76, and constitutional claims, for which he seeks declaratory relief, docket no. 11 at ¶¶ 80-81. As to his non-FTCA claims, Plaintiff cites 28 U.S.C. §§ 1331, 1343, 2201, and 2202, and the Administrative Procedures Act (APA) as the bases for this Court's subject matter jurisdiction. But "Sections 1331 and 1343 . . . may not be construed to constitute waivers of the federal government's defense of sovereign immunity[,]" and likewise, Sections 2201 and 2202 "does not grant any consent of the United States to be sued." *Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972); *Anderson v. United States*, 229 F.2d 675, 677 (5th Cir. 1956); *see also United States v. Smith*, 393 F.2d 318, 321 (5th Cir. 1968); *Alamo Aircraft Ltd. v. City of San Antonio*, 5:15-CV-00784, 2016 WL 5720860, at *3 (W.D. Tex. Sept. 30, 2016). The APA, at 5 U.S.C. § 702, does waive sovereign immunity for claims asserted by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"—but only insofar as their claims "seek[] relief other than money damages[.]" *Doe v. United States*, 853 F.3d 792, 799 (5th Cir. 2017), *as revised* (Apr. 12, 2017); *Sonoma County*, 644 F. Supp. 2d at 1193. The federal Defendants note, however, that the APA's wavier of sovereign immunity is explicitly made subject to "other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief[,]" 5 U.S.C. §§ 701(a)(1), 702, and they argue that this Court lacks jurisdiction over those claims under the INA's limitations on judicial review, particularly 8 U.S.C. § 1252(g). The federal Defendants argue that Section 1252(g), which provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence

proceedings, adjudicate cases, or execute removal orders against any alien under this chapter[,]" functions, together with Section 1252(b)(9), as an "unmistakable zipper clause" requiring that any statutory or constitutional claim against ICE arising from an action or proceeding brought in connection with removal be raised within the administrative immigration proceeding, and then through a petition seeking review by the Fifth Circuit of his final order of removal. Docket no. 45 at 12-13. However, the Supreme Court has rejected the characterization of Section 1252(g) as a "zipper" clause that "covers the universe of deportation claims[,]" and has instead held that it "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (noting that "[t]here are of course many other decisions or actions that may be part of the deportation process" and listing examples). The federal Defendants point out a handful of district court decisions—although none from within the Fifth Circuit—finding that issuance of a detainer request does fall within the scope of Section 1252(g). Docket no. 45 at 14 (citing *Kha Minh Dang v. Short*, 3:15-CV-01870-MA, 2016 WL 1070811, at *3 (D. Or. Mar. 16, 2016) and *Bile v. Lund*, No. 15-5323, 2015 U.S. Dist. LEXIS 117967 (C.D. Cal. Sept. 1, 2015)). However, in other cases, courts have expressed doubt about whether Section 1252(g) reaches the issuance of a detainer request, and the Fifth Circuit has found that at least some confinement-related claims are distinct from the decision to commence proceedings and therefore remain justiciable outside the context of administrative immigration proceedings. *See, e.g.*, *Martinez v. United States*, CV1306844SJOSHX, 2014 WL 12607839, at *5 (C.D. Cal. Mar. 17, 2014) ("Courts are divided as to whether a decision to detain an alien pending removal "arises from" the decision to commence proceedings."); *Humphries v. Various Fed. USINS Employees*, 164 F.3d 936, 944 (5th Cir. 1999) (claim of mistreatment during detention not barred by Section 1252(g)); *see also Alvarez v. U.S.*

Immigration & Customs Enf't, 818 F.3d 1194, 1205 (11th Cir. 2016), *cert. denied sub nom. Alvarez v. Skinner*, 137 S. Ct. 2321 (2017).

Ultimately, this Court need not resolve this question because, even assuming that Plaintiff's remaining claims against the federal Defendants fall within the scope of Section 1252(g), the Court finds that they fail to set forth a plausible claim to relief. Plaintiff does not allege that ICE lacked probable cause of his removability when they issued the detainer request to BCADC, or during his pre-removal confinement after BCADC released him into ICE custody. And more fundamentally, Plaintiff's claims against the federal Defendants gloss over a crucial distinction: he alleges that his detention in BCADC pursuant to ICE's detainer request violated his Fourth and Fifth Amendment rights, but his pleadings show that this detention was not carried out by ICE, but by Bexar County. And, as discussed above, ICE did not compel Plaintiff's detention by issuing a detainer request to BCADC, rather, it merely requested that the County hold him for up to 48 hours beyond the time he would otherwise be released.[5] Despite this lack of any binding directive from ICE that Plaintiff be kept in custody for BCADC, Plaintiff argues without authority that ICE is responsible for BCADC's 76-day post-dismissal detention of Plaintiff because BCADC "act[ed] as the Federal Defendants' agent" and failed to respond to Plaintiff's complaints about his prolonged detention. Docket no. 50 at 9-10.

The core of Plaintiff's claim for declaratory relief against the federal Defendants, however, is that "ICE detainers should be declared unconstitutional[.]" Docket no. 11 at ¶¶ 78-79. Plaintiff has not provided the Court with any authority that would support such a declaration. As discussed above, courts have long held that the authority to issue non-binding requests that law enforcement entities notify immigration enforcement before releasing a particular individual,

[5] Of course, this analysis might differ if ICE were on notice that state law would convert its detainer request into a binding obligation upon the local entity to which it was directed.

or, if possible, prolong their detention to allow immigration enforcers to assume custody of them, is implied by the authority of immigration enforcers to detain those suspected of removability. Likewise, courts have long held that the Constitution permits immigration enforcers to make warrantless arrests of individuals they suspect are removable. *Abel v. United States*, 362 U.S. 217, 230 (1960) ("Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time."). Assuming the truth of all facts alleged in Plaintiff's complaint, the Court agrees with the federal Defendants that he has failed to show that the federal Defendants violated his Fourth Amendment or due process rights by requesting, based on their suspicion of his removability, that Bexar County hold him for an additional 48 hours. Accordingly, Plaintiff's claims seeking non-monetary relief against the federal Defendants should be dismissed.

The Court therefore concludes that the federal Defendants' Motion to Dismiss (docket no. 45) should be granted.

Conclusion and Order

It is therefore ORDERED that:

The Motion to Dismiss submitted by the federal Defendants (docket no. 45) is GRANTED; and

The Motion to Stay Discovery and Scheduling Order Deadlines submitted by the federal Defendants and the Motion to Compel Discovery Responses submitted by Plaintiff (docket nos. 46, 52) are DENIED as moot.

SIGNED this 18 day of October, 2017.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE