

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 20-21911-CIV-MORENO

ALEXEY LEBEDINSKY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

**ORDER DENYING MOTION TO REMAND AND GRANTING MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

THIS CAUSE came before the Court upon Plaintiff's Motion to Remand to State Court, and the Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. Because this action was properly removed pursuant to the Federal Tort Claims Act, the Plaintiff's motion is denied. As the Plaintiff failed to exhaust his administrative remedies, as required by the Federal Tort Claims Act prior to filing this action, the Defendant's motion to dismiss is granted.

I. BACKGROUND

On December 7, 2019, the Plaintiff, Alexey Lebedinsky, filed a two-count complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, arising out of an incident where he was allegedly "Baker Act[ed] without explanation and without his knowledge" from May 21, 2019 to May 22, 2019. In his complaint, the Plaintiff alleges that the defendant, Citrus Health Network, Inc., failed to comply with Florida Statutes § 394.459, which, as alleged, states that service providers for "individuals receiving mental services" must provide the patient "with statutorily mandated rights." Additionally, the Plaintiff alleges a false imprisonment claim under Florida law, claiming that Citrus unlawfully restrained him against his

will at the facility. After filing suit, on December 11, 2019, the Plaintiff filed his administrative tort claim related to the incident in this case with the Department of Health and Human Services.

On May 7, 2020, the United States of America filed its Notice of Removal and Substitution of Party Defendant, noting, in relevant part, that “Citrus [] has been deemed an employee of the Public Health Service [] pursuant to 42 U.S.C. § 233(g), and Citrus [] is certified to have been acting within this federal employment at the time of the incidents out of which this action arises pursuant to 42 U.S.C. § 233(c) and 28 C.F.R. § 15.4.” The Defendant also attached a copy of the Certification by the United States Attorney to the Notice of Removal, which includes a certification that Citrus “was acting within the scope of its employment with the Federal Government at the time of the incident out of which the suit arose.” Moreover, the Defendant has filed a copy of the Department of Health and Human Services’ Notice of Deeming Action on the record, which states that Citrus was an “employee” of the Public Health Service from January 1, 2019, through December 31, 2019.

Thereafter, the Defendant filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction based on the Plaintiff’s failure to exhaust administrative remedies, and the Plaintiff filed a Motion to Remand to State Court, claiming that this action was improperly removed pursuant to 28 U.S.C. § 1446 and that Plaintiff’s claims are exempt from the Federal Tort Claims Act.

II. LEGAL STANDARD

A. Motion to Remand

“A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings.” *Univ. of So. Ala. v.*

Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999). Courts are to construe the removal statutes narrowly resolving uncertainties in favor of remand. *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

B. Subject Matter Jurisdiction

“[A] motion to dismiss for lack of subject matter jurisdiction...can be based upon either a facial or factual challenge to the complaint.” *McElmurray v. Consol. Gov’t of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). When dealing with a facial attack, “the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised,” that is, “the court must consider the allegations in the plaintiff’s complaint as true.” *Id.* (internal citations omitted). “‘Factual attacks,’ on the other hand, challenge ‘the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered.’” *Id.* (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

Moreover, as the Eleventh Circuit noted in *McElmurray*, “[t]he district court has the power to dismiss for lack of subject matter jurisdiction on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of the disputed facts.” *Id.* (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

III. ANALYSIS

Currently before the Court are the Plaintiff’s motion to remand and the Defendant’s motion to dismiss for lack of subject matter jurisdiction. The Court denies the motion to remand because the Defendant timely removed this action pursuant to 28 U.S.C. § 233(c) and the Federal Tort

Claims Act, and the motion to dismiss is granted because the Plaintiff has failed to exhaust his administrative remedies prior to filing suit, *see* 28 U.S.C. § 2675(a).

A. Motion to Remand

In the motion to remand, the Plaintiff contends that remand is appropriate in this case because: (1) the Defendant untimely removed this action pursuant to 28 U.S.C. § 1446(b)(1); (2) the Defendant failed to comply with § 1446(a)'s requirements, namely, that the Defendant failed to file a copy of all process and pleadings with the Notice of Removal; and (3) the Plaintiff's claims against the Defendant are precluded by the exemption contained in 28 U.S.C. § 2680. The Court shall address each of the Plaintiff's arguments.

1. The Defendant, pursuant to 28 U.S.C. § 233(c), timely removed this action.

Section 1446(b) requires that "[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter." 28 U.S.C. § 1446(b)(1).

In the motion to remand, the Plaintiff argues that the Defendant "failed to file a Notice of Removal within thirty (30) days as required by [] § 1446(b)(1)." According to the Plaintiff, the Defendant was served on December 23, 2019, and it did not file its Notice of Removal until May 7, 2020.

In its response, the Defendant claims that § 1446's 30-day time limit does not apply to this case. Rather, according to the Defendant, this case is controlled by the Public Health Service Act, as amended by the Federally Supported Health Centers Assistance Act, 42 U.S.C. § 233, and the

fact that the U.S. Attorney certified scope of employment under the Act in this case. Section 233(a) governs “[c]ivil actions or proceedings against commissioned officers or employees” and the “[e]xclusiveness of remedy” against the United States involving a Federal Tort Claims Act claim. *See* 42 U.S.C. § 233; *see also Allen v. Christenberry*, 327 F.3d 1290, 1294 (11th Cir. 2003) (“The [Federally Supported Health Centers Assistance Act] makes the remedy provided against the United States under the [Federal Tort Claims Act] the exclusive remedy for the medical malpractice of employees or contractors of [the Public Health Service].”).

In *Allen*, the Eleventh Circuit explained how “[t]he [Federally Supported Health Centers Assistance Act] provides authority to remove cases to federal court only in specific and limited circumstances.” *Allen*, 327 F.3d at 1293. The *Allen* court noted that, “[i]n order to be covered under the [Federal Tort Claims Act], an entity, an employee of the entity, or a contractor of the entity seeking coverage must be deemed an employee of [the Public Health Service].” *Id.* at 1294. Should a determination be made that “any officer or employee of [the Public Health Service] [was] acting in the scope of his employment, § 233(b) provides that the Attorney General shall defend such a civil action. *Id.* Specifically, as it relates to removal, the court stated that “[t]he Attorney General may remove a case under § 233(c) this way”:

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond **at any time before trial** by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending [and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto].

Id. (citing § 233(c)) (emphasis added). While the Eleventh Circuit ultimately reversed the district court’s order denying the motion to remand and remanded the case to the district court with instructions to remand to state court (*id.* at 1296), the court reasoned that “[i]f the Attorney General

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