IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

DONNA HOUCK,	)	Civil Action Number: 1:19-cv-02038-JMC
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LOW COUNTRY HEALTH CARE SYSTEM, INC.,	)	
	)	
	)	
Defendant.	)	

MOTION TO SUBSTITUTE THE UNITED STATES AS DEFENDANT, TO SET ASIDE DEFAULT JUDGMENT, AND TO DISMISS THIS ACTION AND MEMORANDUM IN SUPPORT THEREOF

The United States hereby moves this Court for an Order substituting the United States as the only proper party in this FTCA action, setting aside the default judgment entered against an improper party, and dismissing this action for insufficient process and insufficient service of process. The grounds for this Motion are outlined below in this incorporated Memorandum.

STATEMENT OF FACTS AND THE CASE

Plaintiff alleges a sexual assault by a physician occurred on her visit to Low Country Health Care System, Inc. (LCHCS), on September 19, 2011. She alleges in her Complaint that LCHCS is “an entity receiving federal grant money from the United States Public Health Service pursuant to 42 U.S.C. §§ 254b, 254c, 256, or 256a.” so that the United States Department of Health and Human Services “has deemed Defendant LCHCS to be an employee of the federal government only for purposes of coverage under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, *et seq.*” for acts or omissions effective January 1, 2011, through December 31, 2011. Complaint, ¶¶ 3, 22 (ECF No. 1).

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In paragraph 1 of the Complaint, Plaintiff alleges that this "action is brought pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, *et seq.*. *See also* Complaint, ¶ 22 (case is brought pursuant to the FTCA). Plaintiff served LCHCS through the Department of Health and Human Services in Washington, D.C. (ECF No. 5) on July 30, 2019. Plaintiff did not have a summons issued for LCHCS individually or for the United States government. Plaintiff moved for entry of default on December 16, 2019, and the Clerk entered default judgment against LCHCS on that same date.

ARGUMENTS

As outlined in the Complaint, Plaintiff knew that LCHCS was deemed an employee of the United States and that this action was one under the Federal Tort Claims Act. In a previous action involving the same parties, the United States Attorney for the District of South Carolina certified that LCHCS was at all times an entity receiving federal grant money from the United States Public Service pursuant to 42 U.S.C. §§245b, 254c, or 256 and that LCHCS was deemed by the Department of Health and Human Services, pursuant to 42 U.S.C. § 233(h) eligible for coverage under the Federal Tort Claims Act. *See* Certification of Scope of Employment, Pursuant to 42 U.S.C. § 233(c), *Houck v. Jones and Low Country Health Care System, Inc.*, Civil Action No. 1:14-4157-JMC (D.S.C.), attached hereto as Exhibit 1 ("I certify, therefore, that Low Country Health Care System, Inc., was acting within the scope of its employment as a health care center pursuant to the Federally Supported Health Care Centers Assistance Act.") Notably, the United States Attorney certified that Dr. Robert Jones was not acting within the scope of his employment at the time of the alleged incidents so that he could not be deemed an employee of the government pursuant to 42 U.S.C. § 233(c).

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I. The United States Should be Substituted for the Defendant LCHCS.

Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2679, and the Federally Supported Health Care Centers Assistance Act, 42 U.S.C. § 233(g), an action against the United States is the exclusive remedy for this action against LCHCS so that the United States is the only proper party. *See also Robles v. Beaufort Memorial Hospital*, 482 F. Supp. 2d 700 (D.S.C. 2007) (suit against the United States is the exclusive remedy for specified actions against members of the Public Health Services); *Santiago Rosario v. Estado Libre Asociado de Puerto Rico,* 52 F. Supp. 2d 301 (D.P.R. 1999) (United States was properly substituted as named defendant in medical malpractice action brought against an entity which the United States Attorney certified was a Public Health Service entity covered by the Federally Supported Health Centers Assistance Act). Therefore, the United States should be substituted as the defendant in this action.

II. The Default Judgment Against LCHCS Should be Set Aside.

Since LCHCS is not the proper defendant in this action, the default judgment against it should be set aside pursuant to Rule 55 of the Federal Rules of Civil Procedure for good cause shown. The United States is the only proper party, and the United States was not served with the Summons and Complaint in this action.

III. This Action Should be Dismissed for Insufficient Process and Insufficient Service of Process.

Rule 4(i) of the Federal Rules of Civil Procedure requires that, when serving the United States, the party must (1) deliver a copy of the summons and the complaint to the United States Attorney for the district where the action is brought and (2) send a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States at Washington, D.C. Fed. R. Civ. P. 4(i). As the FTCA is referenced throughout the Complaint,

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Plaintiff knew or should have known that the United States was the only proper party and must be served pursuant to Rule 4(i) of the Federal Rules of Civil Procedure. As evidenced by the affidavit of service, only LCHCS in care of the Department of Health and Human Services was served. (ECF No. 5) A summons was not issued to the Department of Health and Human Services, and LCHCS was not served individually at its business address. (ECF No. 4) Moreover, a summons was not issued to the United States Attorney for the District of South Carolina or for the Attorney General of the United States. *Id.* Therefore, pursuant to Rules 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure, this action should be dismissed for insufficient process and insufficient service of process.

The district court in *Wasson v. Riverside County*, 237 F.R.D. 423 (C.D. Cal. 2006) explained the difference between Rules 12(b)(4) and 12(b)(5):

> An objection under Rule 12(b)(4) concerns the form of the process rather than the manner or method of its service. Technically, therefore, a Rule 12(b)(4) motion is proper only to challenge noncompliance with the provisions of Rule 4(b) or any applicable provision incorporated by Rule 4(b) that deals specifically with the content of the summons. A Rule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery or lack of delivery of the summons and complaint.

Id. at 424 (citing *United States v. Hafner*, 421 F. Supp. 2d 1220, 1223 n. 3 (D.N.D. 2006)).

Wright & Miller further explains as follows:

> Although the distinction between Rule 12(b)(4) and 12(b)(5) is easy to state, the line between them becomes blurred when the alleged defect is that the defendant either is misnamed in the summons or has ceased to exist. In these cases, the form of the process could be challenged under Rule 12(b)(4) on the theory that the summons does not properly contain the names of the parties, or a motion under 12(b)(5) could be made on the ground that the wrong party – that is, a party not named in the summons – has been served.

5A Wright & Miller, *Federal Practice and Procedure*, § 1353 at p. 335. In the present case, the

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summons was improperly issued to the wrong party at an incorrect address. Further, a summons was not issued for the only proper party under the FTCA. Moreover, the service was not effectuated pursuant to Rule 4(i) of the Federal Rules of Civil Procedure in that the United States Attorney for the District of South Carolina and the Attorney General of the United States were not served so that the United States would have notice of this suit. Therefore, this action should be dismissed pursuant to Rules 12(b)(4) and 12(b)(5).

Under Rule 4(m) of the Federal Rules of Civil Procedure, "[i]f a defendant is not served within 90 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). Therefore, this action must be dismissed because the United States was not served within ninety days after the Complaint was filed.

CONCLUSION

Based upon the foregoing, including Plaintiff's failure to name the only proper party under this FTCA action and Plaintiff's failure to serve the United States government pursuant to Rule 4(i) of the Federal Rules of Civil Procedure, the United States prays for an order substituting the United States for LCHCS, setting aside the default judgment against LCHCS, dismissing this action for failure of service of process and granting such other relief as deemed just and proper.

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