U.S. Department of Justice

Mark A. Klaassen
United States Attorney
District of Wyoming

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December 29, 2017

Lemuel C. Bray
Kazuko Hayashi Bray
2833 Main Street
Torrington, WY 82240

RE: Civil Case No. 17-CV-206-F

Dear Lemuel Bray and Kazuko Bray:

Enclosed please find the an Entry of Appearance from Assistant United States Attorney Nick Vassallo, the United States' Response to "Motion for Equitable Tolling of the Statute of Limitations", and the attached Rule 56(d) Declaration.

If you have any questions, please feel free to contact this office.

Sincerely,

MARK A. KLAASSEN
United States Attorney

Janee Woodson

Janee C. Woodson, CLAS
Paralegal for AUSA Nick Vassallo

Encl.

MARK A. KLAASSEN
United States Attorney
NICHOLAS VASSALLO (WY Bar #5-2443)
Assistant United States Attorney
P.O. Box 668
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

LEMUEL CLAYTON BRAY, and KAZUKO HAYASHI BRAY, Plaintiffs, v. THE UNITED STATES GOVERNMENT, Defendant.	))))))))))	Civil Case No. 17-CV-206-F

RESPONSE TO "MOTION FOR EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS"

Defendant United States of America, by counsel, respectfully submits this response to Plaintiffs' "Motion for Equitable Tolling of the Statute of Limitations."

I. FACTS

Plaintiffs filed this action against the United States on December 15, 2017. The Complaint seeks relief under the Federal Tort Claims Act (FTCA) and, purportedly, the 14th Amendment to the United States Constitution. ECF 1 at 1. On the same day they filed their complaint, Plaintiffs filed a "Motion for Equitable Tolling of the Statute of Limitations." ECF 2. The motion does not identify any rule of procedure under which it is brought, but it appears to seek a dispositive ruling that Plaintiffs' claims, which are based upon conduct allegedly occurring as early as 1969, are not time-barred.

The United States Attorney's Office was served with Plaintiffs' Complaint and their "Motion for Equitable Tolling of the Statute of Limitations" on December 15, 2017. The United States' response to the Complaint is not due until February 13, 2018. *See* Fed. R. Civ. P. 12(a)(2).

For the reasons that follow, this Court should deny Plaintiffs' "Motion for Equitable Tolling of the Statute of Limitations."

II. ARGUMENT

A. Plaintiffs Have Not Complied With U.S.D.C.L.R. 4.1(b)

In order to achieve service of process upon the United States, a plaintiff must serve both the U.S. Attorney's Office and the United States Attorney General in Washington, D.C. *See* Rule 4(i), Fed. R. Civ. P. This Court's local rules provide that "[e]very party causing a summons to be served shall file with the Clerk of Court the return of service contemporaneously with the filing of any motions and in no event not later than the time within which the party served must respond." U.S.D.C.L.R. 4.1(b). The effect of this rule is to prohibit the filing of any motions against a defendant before establishing that the defendant has been served with process.

Here, Plaintiffs did not file any returns of service contemporaneously with their "Motion for Equitable Tolling of the Statute of Limitations," and Plaintiffs have not established that the Attorney General has been served with process. Consequently, Plaintiffs' motion should be denied for failure to comply with the local rule.

B. Plaintiffs' Motion is Premature

The United States Attorney's Office was served with Plaintiffs' complaint and Plaintiffs' "Motion for Equitable Tolling of the Statute of Limitations" just two weeks ago, on December 15, 2017. The United States' response to the complaint is not due until February 13, 2018. *See* Fed. R. Civ. P. 12(a)(2).

The only rule under which Plaintiffs could possibly file their motion is Rule 56, Fed. R. Civ. P., which addresses motions for summary judgment or partial summary judgment. Fed. R. Civ. P. Rule 56(a) provides that a summary judgment motion may generally be filed "at any time until 30 days after the close of all discovery." Thus, the rule does not prohibit the filing of a summary judgment motion at the commencement of a case. This principle, however, is tempered by subsection (d) of Rule 56. Under that provision, if a nonmovant shows it cannot yet present facts essential to oppose a motion for summary judgment, the Court may deny the motion, defer a ruling, allow time to obtain materials in opposition or take discovery, or "issue any other appropriate order."

Although Plaintiffs have not served any materials in support of their motion, they appear to rely upon medical records generated by providers at different medical facilities of the Department of Veterans' Affairs (VA). As part of the United States' preparation of its defense to Plaintiffs' Complaint, the VA will be providing the U.S. Attorney's Office with medical records and other information. That process is in its initial stages. *See* Rule 56(d) Declaration.

In addition, other evidence relevant to Plaintiffs' equitable tolling theory is undoubtedly in the possession of Plaintiffs. No discovery has yet occurred in this case and, under the Local Rules of this district, discovery is not yet allowed. U.S.D.C.L.R. 26.1(a). Plaintiffs should not be permitted to pursue a partial summary judgment motion before the United States has had an opportunity to engage in discovery.

Plaintiffs' motion is also premature because it seeks an advisory ruling on an issue that is not ripe. The issue of tolling of the statute of limitations is not joined until a defendant raises a statute of limitations defense. The United States has not yet asserted the defense of the statute of limitations, or any other defense, because its response to the complaint is not yet due. Indeed, this

Court may never need to address the issue of equitable tolling because the case may be disposed of on grounds other than the statute of limitations defense.

Plaintiff's motion should be denied as premature, both under Rule 56(d) and for the reason that the statute of limitations issue has not yet been joined.

C. Plaintiffs' Motion is Factually Unsupported

Even if Plaintiffs had filed their motion in compliance with U.S.D.C.L.R. 4.1(b), and it was not premature, the motion would have to be denied because it is factually unsupported. In order to prevail on their motion, Plaintiffs must demonstrate that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. In addition, "[a] party asserting that a fact cannot be disputed" must either "cite to particular parts of materials in the record" or show "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Rule 56(c), Fed. R. Civ. P.

Plaintiffs have not submitted *any* record materials to the Court. Instead, they seek to support their motion only through unsworn, self-serving statements and hearsay. Plaintiffs have not met their burden of establishing the absence of a genuine issue of material fact, and their motion should be denied for that reason.

III. CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that the Court deny Plaintiffs' "Motion for Equitable Tolling of the Statute of Limitations."

DATED this 29th day of December, 2017.

MARK A. KLAASSEN
United States Attorney

By: */s/ Nicholas Vassallo*
NICHOLAS VASSALLO
Assistant United States Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on December 29, 2017, a copy of the *Response to Motion for Equitable Tolling of the Statute of Limitations* was served upon Plaintiffs by mailing a copy to the following:

Lemuel C. Bray and Kazuko Hayashi Bray
2833 Main Street
Torrington, WY 82240

/s/Janee Woodson
United States Attorney's Office

MARK A. KLAASSEN
United States Attorney
NICHOLAS VASSALLO (WY Bar #5-2443)
Assistant United States Attorney
P.O. Box 668
Cheyenne, WY 82003-0668
Telephone: 307-772-2124
nick.vassallo@usdoj.gov

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

LEMUEL CLAYTON BRAY, and KAZUKO HAYASHI BRAY,	)	
Plaintiffs,	)	
v.	)	Civil Case No. 17-CV-206-F
THE UNITED STATES GOVERNMENT,	)	
Defendant.	)	

RULE 56(d) DECLARATION

Nicholas Vassallo hereby declares as follows:

1. I am an Assistant United States Attorney with the U.S. Attorney's Office for the District of Wyoming. I represent the United States in this action.

2. The United States Attorney's Office was served with Plaintiffs' complaint and Plaintiffs' "Motion for Equitable Tolling of the Statute of Limitations" on December 15, 2017. I do not yet know when, or whether, the United States Attorney General has been served with process in this case. The United States' response to the complaint is not due until February 13, 2018. *See* Fed. R. Civ. P. 12(a)(2).

3. Although Plaintiffs have not served any materials in support of their "Motion for Equitable Tolling of the Statute of Limitations," the motion appears to rely upon medical records generated by providers at different medical facilities of the Department of Veterans' Affairs (VA).

4. As part of the United States' preparation of its defense to Plaintiffs' complaint, the VA will be providing the U.S. Attorney's Office with medical records and other information. That process is in its initial stages.

5. No discovery has yet occurred in this case and, under U.S.D.C.L.R. 26.1(a), discovery is not yet allowed because the parties have not yet complied with Fed. R. Civ. P. 26(a)(1).

6. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 29th day of December, 2017.

/s/ Nicholas Vassallo
NICHOLAS VASSALLO
Assistant United States Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on December 29, 2017, a copy of the *Rule 56(d) Declaration* was served upon Plaintiffs by mailing a copy thereof to the following:

Lemuel C. Bray and Kazuko Hayashi Bray
2833 Main Street
Torrington, WY 82240

/s/Janee Woodson
United States Attorney's Office

MARK A. KLAASSEN
United States Attorney
NICHOLAS VASSALLO (WY Bar #5-2443)
Assistant United States Attorney
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FOR THE DISTRICT OF WYOMING

LEMUEL CLAYTON BRAY, and KAZUKO HAYASHI BRAY, Plaintiffs, v. THE UNITED STATES GOVERNMENT, Defendant.	))))))))))	Civil Case No. 17-CV-206-F

ENTRY OF APPEARANCE – NICHOLAS VASSALLO

Undersigned counsel, Assistant United States Attorney Nicholas Vassallo, hereby enters his appearance as an attorney in this case for the Defendant.

DATED this 29th day of December, 2017.

Respectfully Submitted,

MARK A. KLAASSEN
United States Attorney

By: */s/ Nicholas Vassallo*
NICHOLAS VASSALLO
Assistant United States Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on December 29, 2017, a copy of the *Notice of Appearance – Nicholas Vassallo*, was served upon Plaintiffs by mailing a copy thereof to the following:

Lemuel C. Bray and Kazuko Hayashi Bray
2833 Main Street
Torrington, WY 82240

/s/Janee Woodson
United States Attorney's Office