FILED
United States Court of Appeals
Tenth Circuit

April 14, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY EDWARD KUCERA;
BARBARA BLESSING-KUCERA,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 21-2123
(D.C. No. 1:21-CV-00811-RB-SCY)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MORITZ**, **KELLY**, and **CARSON**, Circuit Judges.

Gregory Edward Kucera and his mother, Barbara Blessing-Kucera, appeal the district court's sua sponte dismissal without prejudice of their pro se action against the United States pursuant to Federal Rule of Civil Procedure 41(b) and 28 U.S.C. § 1915(e)(2)(B)(ii). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

In their amended complaint, Kucera and Blessing-Kucera alleged that numerous federal agencies have subjected them to "remote neurological monitoring,"

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

R. at 6, via "brain implant[s]," *id.* at 18, and have installed surveillance equipment in their homes, *id.* at 8, making them involuntary "subject[s] of classified human research" by "lethal weapons program developers," *id.* at 15.

This is the ninth action Kucera has filed in the district of New Mexico since 2017. That court imposed filing restrictions on Kucera in 2018, enjoining him from initiating further litigation in that district unless he is represented by counsel or obtains the court's permission to proceed pro se.[1] Thus, the district court ordered Kucera to show cause why it should not dismiss his claims due to his failure to comply with these filing restrictions in initiating this action. In response, Kucera objected to the filing restrictions and asserted that his claims are not frivolous. Noting that the deadline to object to the filing restrictions had passed, the court concluded that neither the nature of his claims nor his asserted good faith justified Kucera's noncompliance. It therefore dismissed Kucera's claims without prejudice, leaving only the claims raised by Blessing-Kucera.

The district court then construed the amended complaint as attempting to assert claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Privacy Act, 5 U.S.C. § 552a(g)(1)(A-D), and the Federal Tort Claims Act (FTCA). The district court dismissed Blessing-Kucera's *Bivens* and Privacy Act claims for failure to state a claim after concluding she failed

[1] After Kucera filed two more actions without first complying with these filing restrictions, the district court imposed an additional restriction in 2019 requiring him to prepay the filing fee in all future actions. He prepaid the filing fee in this action.

to sufficiently allege who did what to her or when and how they did it. In addition to failing to provide fair notice of her Bivens and Privacy Act claims, the district court noted that Blessing-Kucera failed to allege facts identifying which Privacy Act provisions the identified federal agencies allegedly violated. Lastly, the court held it lacked subject-matter jurisdiction over Blessing-Kucera's FTCA claim because she failed to allege that she had exhausted administrative procedures, as required by 28 U.S.C. § 2675(a). Although the amended complaint attached a claim she filed with a federal agency, Blessing-Kucera did not allege facts demonstrating that claim had been finally denied or that she had administratively exhausted any other FTCA claim.

The district court entered final judgment dismissing the action without prejudice, after which Kucera and Blessing-Kucera filed a timely notice of appeal. Because Appellants are proceeding pro se, we construe their filings liberally, but we do not act as their advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

We review the district court's dismissal of Kucera's claims for an abuse of discretion. *See Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002) (reviewing dismissal for failure to follow court order for abuse of discretion). Kucera does not assert that he complied with the filing restrictions by having counsel sign his pleading or by obtaining the district court's permission to proceed pro se. And to the extent he seeks to challenge those restrictions, the time to do has passed. *See Werner v. Utah*, 32 F.3d 1446, 1448 (10th Cir. 1994) ("[I]f petitioner disagrees

with the district court's filing restrictions, his avenue for review is an appeal from the order establishing the restrictions.").[2] We therefore affirm the district court's dismissal of Kucera's claims.

We review de novo the district court's dismissal of Blessing-Kucera's claims. *See McBride v. Deer*, 240 F.3d 1287, 1289 (10th Cir. 2001) (reviewing dismissal for failure to state a claim de novo); *Lopez v. United States*, 823 F.3d 970, 975 (10th Cir. 2016) (reviewing issue of subject-matter jurisdiction de novo). She bears "the burden of alleging sufficient facts on which a recognized legal claim could be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). And "conclusory allegations without supporting factual averments are insufficient." *Id.* Ultimately, a complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Smith v. United States*, 561 F.3d 1090, 1104 (10th Cir. 2009) (internal quotation marks omitted).

Blessing-Kucera fails to address the district court's rationales for dismissing her *Bivens* and Privacy Act claims. Asserting that the district court erred, without advancing a "reasoned argument as to the grounds for the appeal," is insufficient appellate argument. *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223 n.6 (10th Cir. 2008) (internal quotation marks omitted); *see also Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) (stating "perfunctory" allegations of error are not "sufficient to invoke appellate review"). Thus, we affirm the district court's

[2] Kucera filed a notice of appeal following the district court's imposition of filing restrictions in 2018, but his appeal was dismissed for lack of prosecution.

dismissal of Blessing-Kucera's *Bivens* and Privacy Act claims for failure to state a claim.

Turning to her FTCA claim, we note that Blessing-Kucera's appeal argument is unclear. But liberally construing her brief, she may be asserting that the district court erred in dismissing her FTCA claim for lack of subject-matter jurisdiction because, contrary to the court's conclusion, she did allege sufficient facts to demonstrate that she administratively exhausted that claim. But her oblique references to Kucera's allegations in previous litigation, to which she was not a party, fail to show that the amended complaint in this action sufficiently alleged exhaustion as to *her* FTCA claim. And as the district court held, the claim form Blessing-Kucera attached to the amended complaint did not, by itself, demonstrate that the agency had finally denied that claim before she filed this action.[3] Because Blessing-Kucera fails to show the district court erred in dismissing her FTCA claim for lack of subject-matter jurisdiction, we affirm that ruling.[4]

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[3] Although Blessing-Kucera could deem her claim finally denied if the agency failed to make a final decision within six months of her claim's filing date, *see* § 2675(a), she did not wait six months before filing this action, *compare* R. at 34 (administrative claim dated July 9, 2021), *with id.* at 1 (original complaint filed on August 23, 2021).

[4] The district court cited *Lopez*, 823 F.3d at 976, for the proposition that the exhaustion requirement in § 2675(a) is jurisdictional. We note there is a circuit split on whether § 2675 is a jurisdictional rule or a claims-processing rule. *Compare White-Squire v. U.S. Postal Serv.*, 592 F.3d 453, 456-58 (3d Cir. 2010) (holding the sum-certain requirement in § 2675(b) is jurisdictional because the FTCA's jurisdiction-granting provision, 28 U.S.C. § 1346(b)(1), states that district courts have jurisdiction "[s]ubject to the provisions of chapter 171," and § 2675 is contained in chapter 171 (internal quotation marks omitted)), *and Mader v. United States*,

We affirm the district court's judgment. The pending motions and petition for a writ of mandamus are denied.

Entered for the Court

Nancy L. Moritz
Circuit Judge

654 F.3d 794, 806-08 (8th Cir. 2011) (applying the same reasoning in holding that the exhaustion requirement in § 2675(a) is jurisdictional), *with Copen v. United States*, 3 F.4th 875, 880-82 (6th Cir. 2021) (rejecting that court's longstanding holding that § 2675(b) is jurisdictional, as well as the reasoning in *White-Squire* and *Mader*, and holding that § 2675(b) is a claims processing rule because: (1) the Supreme Court has not spoken on the issue, (2) § 2675 itself does not include jurisdictional language, and (3) chapter 171 contains many other provisions that are clearly not jurisdictional). We do not reach this issue because Blessing-Kucera does not raise it on appeal.