04-6442-cv

To be Argued By:
LISA E. PERKINS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-6442-cv

CHRISTOPHER L. BAKOWSKI,
Plaintiff-Appellant,

-vs-

EDWARD E. HUNT, LT. COLONEL; JOSEPH H. ROUSE, CHIEF & DEPUTY CHIEF; JAMES P. GERSTENLAUER, COLONEL; BRETT COAKLEY, MAJOR; MIKE DEEGAN CAPTAIN; JOHN DOE, U.S. ATTORNEY'S OFFICE; DEPARTMENT OF JUSTICE; UNITED STATES AIR FORCE; UNITED STATES DEFENSE CONTRACT AUDIT AGENCY; UNITED STATES ARMY; McCONNON, MAJOR; MITCHELL, OGC,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE DEFENDANTS-APPELLEES

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

LISA E. PERKINS
SANDRA S. GLOVER
Assistant United States Attorneys

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STATEMENT OF JURISDICTION

The plaintiff invoked the subject matter jurisdiction of the district court (Stefan R. Underhill, J.) under 28 U.S.C. § 1331 alleging constitutional and federal statutory violations by federal officials. As explained below, however, the district court lacked jurisdiction over the plaintiff's amended pleading because he failed to file his administrative claim with the appropriate federal agency within the two-year statute of limitations mandated by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), 2671 to 2680. The district court granted the defendants' motion to dismiss on February 27, 2004. Judgment entered for the defendants on March 2, 2004. On March 12, 2004, the plaintiff filed a motion for reconsideration of the dismissal. On October 25, 2004, the district court granted the motion for reconsideration, but abided by its previous order granting the motion to dismiss. The plaintiff filed a timely notice of appeal on December 8, 2004, pursuant to Fed. R. App. P. 4(a). This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court correctly concluded that the plaintiff failed to satisfy the two-year statute of limitations for the filing of administrative claims pursuant to the Federal Tort Claims Act ?

II. Whether the plaintiff's failure to exhaust his administrative remedies before filing suit mandates dismissal of his suit?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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CHRISTOPHER L. BAKOWSKI,

Plaintiff-Appellant,

-vs-

EDWARD E. HUNT, LT. COLONEL; JOSEPH H. ROUSE, CHIEF & DEPUTY CHIEF; JAMES P. GERSTENLAUER, COLONEL; BRETT COAKLEY, MAJOR; MIKE DEEGAN CAPTAIN; JOHN DOE, U.S. ATTORNEY'S OFFICE; DEPARTMENT OF JUSTICE; UNITED STATES AIR FORCE; UNITED STATES DEFENSE CONTRACT AUDIT AGENCY; UNITED STATES ARMY; McCONNON, MAJOR; MITCHELL, OGC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE DEFENDANTS-APPELLEES

Preliminary Statement

In this Federal Tort Claims Act ("FTCA") appeal, the plaintiff, Christopher L. Bakowski, forfeited the opportunity for judicial review of his FTCA causes of action for two reasons.

First, he failed to submit his administrative claim to the Government in a timely manner. In dismissing the plaintiff's suit for non-compliance with the FTCA's two-year statute of limitations, the district court correctly concluded that the plaintiff's FTCA claim accrued no later than June 8, 1999, and therefore, that his administrative claim had to be submitted to the Government by no later than June 8, 2001. The plaintiff's claim, submitted on March 15, 2002, was filed too late.

Second, by presenting his March 15, 2002 administrative claim to the Government and then filing suit on April 26, 2002, plaintiff failed to exhaust his FTCA administrative remedies because he did not allow the Government the six-month time period under the FTCA to consider the claim in the absence of a pending suit. Exhaustion is a jurisdictional prerequisite to the filing of an FTCA cause of action.

Statement of the Case

This is a civil appeal from the entry of judgment by the United States District Court (Stefan R. Underhill, J.), after dismissal of the plaintiff's amended complaint.

On April 26, 2002, the plaintiff, proceeding *pro se*, filed a complaint alleging that the defendants (eight federal officials and four federal agencies or departments) sought to deprive him of his constitutional and statutory rights by conspiring to fabricate documents that were used to support a dispositive motion in a then-pending case the plaintiff had brought against other federal officials and agencies. He also alleged that the defendants had destroyed documents in an attempt to conceal the fabrication. Appendix of Appellant ("Plaintiff's Appendix" ("PA")) PA-4 at 6-9. On November 20, 2002, the defendants filed a Fed. R. Civ. P. 12(b)(5) motion to dismiss for insufficiency of service of process. Appendix of Defendants-Appellees ("Government Appendix" ("GA")) 3.[1] On January 8, 2003, the district court denied this motion without prejudice. GA 4.

The defendants filed separate Fed. R. Civ. P. 12(b) motions to dismiss on February 26 and June 11, 2003, respectively. GA 5. On September 15, 2003, the district court orally denied the February 26th motion, and granted the June 11th motion without prejudice to the filing of an amended complaint within 30 days. GA 5-6.

On October 15, 2003, the plaintiff moved to amend his complaint. GA 6. On October 31, 2003, the district court granted the plaintiff's motion to amend, and the plaintiff's "Complaint (Second Amendment)" was docketed that day

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[1] Because the plaintiff's appendix does not include the docket entries from the proceedings below, the defendants-appellees have moved for permission to file their own appendix in this matter.

as plaintiff's "Second Amended Complaint" (hereinafter, "amended complaint").[2] GA 6. The amended complaint alleged that the defendants' conspiracy to fabricate documents and their destruction of documents constituted state law torts of intentional and negligent infliction of emotional distress. PA-5 at 3-9.

On November 18, 2003, the defendants moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b). GA 6. At a motion hearing held on February 27, 2004, the district court orally granted the November 18th motion to dismiss. *See* Docket # 41, GA 6-7. Judgment for the defendants entered on March 2, 2004. GA 7.

On March 12, 2004, the plaintiff moved for reconsideration of the granting of the motion to dismiss. GA 7. On October 25, 2004, the district court granted the motion for reconsideration, but ruled that it would abide by its February 27th dismissal of the suit. GA 7; PA-1.

On December 8, 2004, the plaintiff filed a timely notice of appeal. GA 7; PA-2 at 1-2.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

The facts relevant to this appeal are directly related to events that took place in an earlier civil case that

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[2] Despite the terminology employed by the plaintiff and the district court for identification of the pleading docketed on October 31, 2003, there was but one amended complaint filed in this matter.

eventually reached this Court on other appellate grounds. *See Bakowski v. Kurimai*, No. 02-6247, 2003 WL 23023769 (2d Cir. Dec. 23, 2003) ("*Bakowski I*") (summary affirmance of district court's grant of summary judgment), *cert. denied*, 125 S. Ct. 1669 (Mar. 21, 2005). *Bakowski I*, in turn, was the offspring of a criminal case in which the plaintiff was a co-defendant.

A. Underlying Criminal and Civil Proceedings

In 1994, the plaintiff was indicted by a federal grand jury, in the criminal case of *United States v. Peter A. Danna, et al.,* Crim. No. 94-CR-158 (PCD), for conspiracy to defraud the United States Air Force and for making false statements. *See* Docket No. 94-CR-158 (PCD), GA 9-11; PA-10.[3] The case went to trial on October 16, 1995, and concluded on October 31, 1995, with a verdict of not guilty as to the plaintiff. GA 25-26.

In response, the plaintiff filed a *pro se* civil suit for malicious prosecution on November 24, 1998. GA 30; PA-13. In this suit, *Bakowski I*, he sued fifteen employees of three federal agencies -- the Department of Justice, the Air Force, and the Defense Contract Audit Agency. He also named the three agencies as defendants. GA 27-30; PA-13.

The complaint alleged that the defendants had subverted the grand jury process, through the use of false,

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[3] For the Court's convenience, copies of the docket entries from the original criminal matter and *Bakowski I* are included in the Government's proposed appendix.

misleading, and deceptive testimony, to obtain an indictment against the plaintiff. PA-13 at 5-23. The plaintiff predicated jurisdiction in his malicious prosecution suit on several federal statutes, including the FTCA, 28 U.S.C. §§ 1346(b), 2401(b), 2671 to 2680. PA-13 at 4. He also asserted jurisdiction pursuant to the judicially-created remedy made available in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). PA-13 at 4.

On April 26, 1999, the defendants in *Bakowski I* moved to dismiss the complaint in its entirety. GA 30. The defendants argued, *inter alia*, that the plaintiff's FTCA claim was barred because he had not satisfied the statute's six-month limitations period for filing suit after the denial of an administrative claim. PA-3 at 6-7; *see also* 28 U.S.C. § 2401(b) (FTCA claims must be filed within six months after denial of administrative claim). In support of their contention, the defendants relied on an administrative claim denial letter, date-stamped May 15, 1998, that had been prepared by the Department of the Army. PA-15 at 1-2.

On June 8, 1999, the plaintiff filed an opposition to the motion to dismiss, including a copy of a claim denial letter from the Army date-stamped May 27, 1998. GA 31; PA-16; PA-12 at 1-2. The May 15th and 27th letters are identical except for their dates and the "c.c." list included in the May 15th letter but not in the May 27th letter. On August 20, 1999, the defendants filed a reply memorandum in support of their motion to dismiss. GA 32. Because the defendants had not been able to resolve why two denial letters appeared to exist, the defendants

withdrew their argument regarding the six-month limitations period in the FTCA. PA-3 at 7.

On March 20, 2000, the district court granted the defendants' Rule 12(b) motion in part and denied it in part. GA 33. The court dismissed the suit as to all of the named defendants. In addition, the court granted the plaintiff's request to add the United States as a defendant to the suit but limited the scope of the case to "the plaintiff's sole remaining cause of action, i.e., his FTCA malicious prosecution claim against the United States based upon the acts or omissions of employees of the [Air Force]." *Bakowski v. Kurimai,* No. 3:98CV2287 DJS, 2000 WL 565230, at *7 (D. Conn. Mar. 20, 2000).

The United States moved for summary judgment, and on July 30, 2002, the district court granted the United States' motion. GA 35. This Court summarily affirmed the district court's judgment on December 23, 2003, *see Bakowski v. Kurimai,* No. 02-6247, 2003 WL 23023769 (2d Cir. 2003), and the Supreme Court denied the plaintiff's petition for a writ of certiorari on March 21, 2005, *see Bakowski v. Kurimai,* 125 S. Ct. 1669 (2005).

B. The Instant Matter

By letter dated March 15, 2002, the plaintiff submitted an FTCA administrative claim to the Government regarding the purported fraudulent fabrication of documents in support of the defendants' motion to dismiss in *Bakowski I.* PA-3 at 1-2. The plaintiff stated that he and his family had suffered emotional distress as a result

of the alleged fabrication, and he set forth $12,000,000 as his sum certain for damages. PA-3 at 2.

Approximately six weeks later, on April 26, 2002, the plaintiff filed the instant suit, alleging that the defendants violated his constitutional rights by conspiring to fabricate the May 15, 1998 denial-of-claim letter that had been offered in support of the defendants' motion to dismiss in *Bakowski I*. The plaintiff also alleged that the defendants had destroyed documents in an attempt to conceal the fabrication of the May 15, 1998 letter. PA-4 at 6-9. He predicated jurisdiction, in part, on 42 U.S.C. § 1983 and *Bivens*. PA-4 at 4. The plaintiff also noted that "[t]his case is also pending as an administrative claim under the [FTCA]," and that "[t]he FTCA contains a mandatory six-month administrative investigation and settlement period." PA-4 at 4.

The defendants filed four Fed. R. Civ. P. 12(b) motions in this matter. They moved initially, on November 20, 2002, pursuant to Rule 12(b)(5) to dismiss for insufficiency of service of process. GA 3. The district court denied this dismissal motion without prejudice on January 8, 2003. GA 4. On that same date, the district court granted the plaintiff's motion for additional time to effect service of process on the defendants. GA 4.

On February 26, 2003, the defendants renewed their Rule 12(b)(5) motion. GA 5. On June 11, 2003, the defendants moved to dismiss pursuant to Rules 12(b)(1), (2), and (6), contending that the complaint was defective in its entirety. GA 5. Record on Appeal ("Record") # 24. The defendants argued, *inter alia*, that the plaintiff had

failed to plead sufficient facts to establish personal jurisdiction over the non-resident defendants, that the plaintiff had failed to sufficiently allege the violation of a cognizable constitutional right, and that federal agencies are not proper defendants in a *Bivens* suit. Record # 24, at 3-9. The defendants also argued that to the extent the district court were to construe the complaint as including an FTCA claim, the plaintiff had failed to name the United States as a defendant. Record # 24, at 7-9; *see Rivera v. United States,* 928 F.2d 592, 609 (2d Cir. 1991) (United States the only proper defendant in an FTCA action).

On September 15, 2003, the district court heard oral argument on the defendants' two pending motions to dismiss. The court orally denied the February 26th motion and granted the June 11th motion without prejudice to the filing of an amended complaint within 30 days. GA 5-6; Record # 30.

Rather than file an amended pleading, the plaintiff sought leave to file an amended complaint within the 30 day period, and leave was granted. GA 6. His amended complaint was docketed on October 31, 2003. GA 6. The causes of action in the amended complaint were limited to the state law torts of intentional and negligent infliction of emotional distress resulting from the defendants' purported fabrication and destruction of documents in *Bakowski I.* PA-5, at 3-10.

On November 18, 2003, the defendants moved to dismiss the amended complaint under Fed. R. Civ. P. 12(b), arguing, among other things, that the plaintiff had failed to satisfy the two-year limitations period of

§ 2401(b) for the filing of FTCA administrative claims. GA 6; PA-6 at 2-6. At a motion hearing conducted on February 27, 2004, the district court orally granted the defendants' motion, holding that the plaintiff had not met his burden of demonstrating compliance with § 2401(b). GA 6-7; Record # 49. Judgment for the defendants entered on March 2, 2004. GA 7.

On March 12, 2004, the plaintiff moved for reconsideration of the granting of the motion to dismiss, arguing in part that the district court had incorrectly ruled on the § 2401(b) issue. GA 7; PA-8 at 1-6. On October 25, 2004, the district court granted the motion for reconsideration, but ruled that it would abide by its February 27th dismissal of the suit. GA 7.

On December 8, 2004, the plaintiff filed a timely notice of appeal.[4] GA 7; PA-2 at 1-2.

SUMMARY OF ARGUMENT

The Court should affirm the district court's dismissal of the plaintiff's suit because the plaintiff cannot satisfy his burden of proving that he filed an FTCA administrative claim within the two-year period permitted by the statute. *See* 28 U.S.C. § 2401(b). The plaintiff's tort claim regarding the alleged fabrication of documents accrued, at

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[4] In his notice of appeal, the plaintiff mistakenly stated that he was appealing from the district court's October 25, 2004 ruling that granted the defendants' motion for summary judgment. PA-2 at 1. There was no summary judgment motion filed in this case, however.

the latest, by June 8, 1999, the date on which he filed his opposition to the defendants' motion to dismiss in *Bakowski I*. By that date, at the latest, the plaintiff had suffered an injury and knew the critical facts about his injury. Thus, his March 15, 2002 FTCA administrative claim was submitted to the Government almost a year beyond the June 8, 2001 deadline for the filing of an FTCA claim. The fact that the plaintiff may not have known the full extent of his injuries until later does not change the date of his original injury.

In the alternative, the Court should affirm the district court's dismissal because the plaintiff failed to exhaust his FTCA administrative remedies before filing suit. His suit was filed approximately six weeks after presentation of his FTCA claim to the Government, thus violating the FTCA's jurisdictional proscription that an agency shall have six months to review an administrative claim before a plaintiff may initiate suit on the claim. *See* 28 U.S.C. § 2675(a).

ARGUMENT

I. The District Court Properly Concluded That The Plaintiff Failed To Satisfy The Two-Year Statute Of Limitations For The Filing Of Administrative Claims Pursuant To The Federal Tort Claims Act.

A. Relevant Facts

On April 26, 1999, the defendants in *Bakowski I* filed a motion to dismiss that relied in part on an allegedly false May 15, 1998 administrative claim denial letter to support

their argument that the plaintiff had failed to satisfy the FTCA's six-month limitations period for filing suit after denial of an administrative tort claim. On June 8, 1999, the plaintiff filed a memorandum in opposition to the motion to dismiss; attached to the memorandum as an exhibit was an essentially identical administrative claim denial letter date-stamped May 27, 1998. On August 20, 1999, the defendants filed a reply memorandum in support of their motion to dismiss. In that filing, the defendants specifically withdrew their argument that the plaintiff had failed to file suit within six months after the date of mailing of the Government's administrative claim denial letter.

By letter dated March 15, 2002, the plaintiff initiated an FTCA administrative claim for alleged tort injuries resulting from the *Bakowski I* defendants' use of the May 15, 1998 denial letter in support of their motion to dismiss.

B. Governing Law and Standard of Review

The FTCA is an express, limited waiver of the Government's sovereign immunity from suit:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in

> accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The Supreme Court has consistently held that "law of the place" in § 1346(b) means the state where the act or omission took place. *FDIC v. Meyer,* 510 U.S. 471, 478 (1994). Thus, state law provides the source of substantive liability for causes of action cognizable under § 1346(b), and the FTCA is the exclusive remedy for such causes of action. *Id.*; *see also* 28 U.S.C. § 2679(b)(1) (FTCA is "exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim").

Moreover, with respect to tort claims against the United States, the "'limitations and conditions upon which the Government consents to be sued must be strictly observed.'" *Lehman v. Nakshian,* 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States,* 352 U.S. 270, 276 (1957)). One such limitation and condition is the time period in which tort claims must be presented to the United States: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b). The purpose behind this time provision is "to require the reasonably diligent presentation of tort claims against the Government." *United States v. Kubrick,* 444 U.S. 111, 123 (1979). Section 2401(b) has been construed as a substantive condition of the Government's limited waiver of immunity under the FTCA, and, therefore, satisfaction of the two-year limitations period is a jurisdictional prerequisite to recovery under the statute. *Id.* at 117-18.

In addition, although the statute looks to state law to determine whether a valid cause of action exists, "[t]he date on which an FTCA claim accrues is determined as a matter of federal law." *Syms v. Olin Corp.,* __ F.3d __, __, 2005 WL 1164011, at **8-9 (2d Cir. May 18, 2005) (citations omitted).

The district court dismissed the plaintiff's amended complaint and entered judgment in favor of the defendants. This Court reviews *de novo* a district court's dismissal of a complaint. *See Miller v. Wolpoff & Abramson, LLP,* 321 F.3d 292, 300 (2d Cir.), *cert. denied,* 540 U.S. 823 (2003). On a motion to dismiss, the Court also "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *Patel v. Contemporary Classics of Beverly Hills,* 259 F.3d 123, 126 (2d Cir. 2001).

C. Discussion

The district court correctly held that the plaintiff filed his administrative claim outside the two-year statute of limitations. The plaintiff waited almost three years, to March 15, 2002, to pursue an administrative tort claim for allegedly fraudulent conduct that the plaintiff had identified in his June 8, 1999 memorandum in opposition to the *Bakowski I* defendants' motion to dismiss. PA-1 at 3. According to the district court, "even if the severity of Bakowski's injury was not apparent to him until 2000, he was aware of the fact of the alleged outrageous conduct and its cause, by June 8, 1999. Thus, his claim accrued then and had to be brought before June 8, 2001 -- almost a year before it was actually initiated." PA-1 at 2.

In ruling on the plaintiff's motion for reconsideration of the dismissal of the amended complaint, the district court relied in part on this Court's decision in *Kronisch v. United States,* 150 F.3d 112 (2d Cir. 1998). There, the plaintiff sued the United States and two federal officials, alleging that he had been the victim of the Central Intelligence Agency's ("CIA") program to test mind-altering drugs on unwitting subjects. He claimed that a Government agent had placed lysergic acid diethylamide ("LSD") in his drink in a foreign café in October 1952. *Id.* at 116. Through a sibling, the plaintiff learned in 1977 about media reports that the CIA may have experimented in the 1950's with LSD on unsuspecting persons in foreign countries. *Id.* at 119. Shortly thereafter, the plaintiff "first formed a belief that he had been drugged by the CIA in 1952." *Id.* For the remainder of 1977 and into early 1978, he expressed this belief in letters to the CIA and Government officials. *Id.* at 120.

In 1981 the plaintiff in *Kronisch* obtained additional information about the CIA's drug-testing program from a friend who had reviewed CIA files made public pursuant to the Freedom of Information Act. *Id.* The plaintiff filed an FTCA administrative claim with the CIA on December 22, 1981, and the claim was denied almost a year later. *Id.* The plaintiff timely filed suit, alleging, in part, common-law tort claims of negligence, invasion of privacy, misrepresentation, and intentional infliction of emotional distress. *Id.*

The *Kronisch* Court affirmed the district court's holding that plaintiff's tort claims were barred by the two-year limitations period in § 2401(b) of the FTCA. *Id.* at

121-23. The Court began its analysis by noting that "[o]rdinarily, a plaintiff's FTCA claim accrues at the time of injury." *Id.* at 121 (citing *Barrett v. United States,* 689 F.2d 324, 327 (2d Cir. 1982)). The Court recognized that there can be instances, however, where the Government conceals the acts giving rise to a tort claim, or where a plaintiff "would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted." *Id.* In such circumstances, "the so-called 'diligence-discovery rule of accrual' applies. Under this rule, 'accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause.'" *Id.* (quoting *Barrett,* 689 F.2d at 327). The *Kronisch* Court continued:

> Discovery of the 'critical facts' of injury and causation is not an exacting requirement, but requires only 'knowledge of, or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it. . . . [A] plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice.'

Id. (quoting *Guccione v. United States,* 670 F. Supp. 527, 536 (S.D.N.Y. 1987) (citations omitted), *aff'd on other grounds,* 847 F.2d 1031 (2d Cir. 1988)).

In applying these legal principles to the facts before it, the *Kronisch* Court found that the plaintiff was aware of the critical facts of his FTCA claim well before December 22, 1979, i.e., two years before he filed his administrative claim on December 22, 1981. As a result, the plaintiff had allowed the two-year deadline of § 2401(b) to run before filing an untimely claim addressing his belief that he had been injured as the result of a CIA drug experiment. *Id.* at 121-23.

In the instant matter, there is nothing out of the ordinary that would except this case from the general rule that an FTCA claim accrues at the time of injury. *Barrett*, 689 F.2d at 327. As the district court held, the plaintiff knew of his injury by June 8, 1999 at the latest. However, even if the diligence-discovery rule of accrual of *Kronisch* and *Barrett* is applicable here, the plaintiff was well aware before March 15, 2000 of the 'critical facts' underlying his March 15, 2002 FTCA claim, and his amended complaint is therefore barred by § 2401(b)'s prohibition on filing claims more than two years after they have accrued.

There can be no dispute that the critical facts underlying the plaintiff's March 15, 2002 tort claim were known to him before March 15, 2000. In his June 8, 1999 opposition filing to the defendants' motion to dismiss, the plaintiff made clear that the sole purpose of the filing was to focus on the defendants' reliance on the May 15, 1998 denial letter as the basis for their § 2401(b) argument. He brought the existence of the May 27, 1998 claim denial letter to the district court's attention with the comment that "it appears that there is a bit of a discrepancy between what the government has sworn to be the truth and what

actually *is* the truth." PA-16 at 2 (emphasis in original). He then asked the court to deny the defendants' motion in full "[t]he mystery and potential criminality of this discrepancy notwithstanding." PA-16 at 2. Even a cursory review of the plaintiff's June 8, 1999 filing leaves little doubt that he regarded the May 15, 1998 denial letter as a fabrication.[5]

The plaintiff acknowledges that on June 8, 1999 he submitted an opposition to the *Bakowski I* defendants' motion to dismiss "which included the real letter dated May 27, 1998." Brief of Appellant at 7. He contends, however, that his FTCA claim did not accrue until the alleged physical symptoms of his injury manifested themselves "some time in late 2000 or 2001 (at the earliest)." *Id.* at 10. He relies, for the most part, on non-FTCA cases that are inapposite both legally and factually. *See, eg., Rotella v. Wood,* 528 U.S. 549, 558-59 (2000) (in Racketeer Influenced Corrupt Organizations Act ("RICO") case involving suit against physicians and others, and in which plaintiff was aware of injury when it occurred, Supreme Court declined to adopt construction of RICO's four-year statute of limitations that would toll statute until a plaintiff's reasonable discovery of a pattern of illegal

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[5] In a later filing in opposition to the defendants' motion to dismiss, dated July 14, 1999, the plaintiff emphasized that the defendants' § 2401(b) argument is "based solely on the fraudulent and deceitful submission of 'doctored' documents, by unknown persons, to this Court." Record # 38, Attachment C thereto ("Second Memorandum in Support of Plaintiff's Rebuttal to the Defendants' Motion to Dismiss (Doc # 14)") at 4.

acts); *Metro-North Commuter R.R. Co v. Buckley,* 521 U.S. 424, 426-27 (1997) (in Federal Employers' Liability Act ("FELA") case, statute of limitations not directly at issue; rather, where plaintiff had been exposed to asbestos but had not shown any symptoms of disease, Supreme Court held that plaintiff could not recover for emotional distress damages unless and until there is manifestation of symptoms of disease); *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 549-50 (1994) (in FELA suit, statute of limitations not at issue; rather, Supreme Court addressed whether negligent infliction of emotional distress is cognizable cause of action under the statute); *Urie v. Thompson,* 337 U.S. 163, 170-71 (1949) (in FELA action where plaintiff had contracted silicosis because of continuous inhalation of silica for approximately 30 years, but where plaintiff had not become too ill to work until after the 30 years, Supreme Court held that plaintiff's action not barred by the three-year limitations period in the FELA); *Mix v. Delaware & Hudson R.R. Co., Inc,* 345 F.3d 82, 86 (2d Cir. 2003) (plaintiff in FELA case allegedly sustained gradual hearing loss over 27 years of employment; in such circumstances, Court recognized FELA action accrues when plaintiff, in exercise of reasonable diligence, knows both existence and cause of injury), *cert. denied,* 540 U.S. 1183 (2004).

The only FTCA case cited by the plaintiff, *United States v. Kubrick,* 444 U.S. 111 (1979), is similarly unhelpful to him. The plaintiff in *Kubrick* was administered an antibiotic at a veteran's hospital in April 1968. *Id.* at 113. Approximately six weeks later, the plaintiff noticed a ringing sensation in his ears and some loss of hearing. *Id.* at 113-14. By January of 1969, he had

been diagnosed with bilateral nerve deafness and had been informed that it was very likely his hearing loss was the result of the antibiotic treatment. *Id.* at 114. More than two years later, plaintiff sued under the FTCA for negligent treatment, and the Government argued that plaintiff's claims were barred by § 2401(b). *Id.* at 115. Plaintiff contended that his claim did not accrue until he knew he had received negligent treatment. *Id.* at 115-16. The *Kubrick* Court held that accrual of an FTCA claim need not "await awareness by the plaintiff that his injury was negligently inflicted." *Id.* at 123. Instead, a claim accrues when the plaintiff knows both the existence and cause of his injury. *Id.* at 122-23. Unlike the instant matter, *Kubrick* is a medical malpractice case where the plaintiff was not aware at the time of his antibiotic treatment that he had been injured, and *Kubrick* should be read in that light.

However, even if *Kubrick* is directly applicable to this appeal, the plaintiff knew by June 8, 1999 both the existence and cause of his injury, i.e., he had formed a belief that he was a victim of fraud, and he believed that several federal officials had conspired to perpetrate the alleged fraud. In responding to the defendants' motion to dismiss, he mounted a vigorous challenge to the May 15, 1998 denial letter that required the preparation of an opposition memorandum. Moreover, he had to expend the time, and bear any expenses, associated with the investigation and preparation of his challenge. The fact that, according to the plaintiff, he suffered additional damages later in the form of mental distress and suffering, does not change the fact that he knew by June 8, 1999 that he had been injured.

As the district court succinctly explained:

> [The plaintiff] was not, according to his complaint, the victim of numerous or continuous acts of outrageous conduct. Rather, he experienced one instance of allegedly outrageous conduct, submission of the allegedly false letter, the existence and cause of which were both almost immediately known to him as indicated by his prompt reaction to the filing of the letter. In other words, Bakowski suffered one injury, and he suffered it before June 8, 1999. Consequently . . . as soon as Bakowski was injured, i.e., *as soon as he knew the letter had been filed and believed it was false, his claim accrued. The accumulation of damages after an injury does not alter the date of the injury and therefore does not postpone the accrual of the cause of action*.

PA-1 at 3 (emphasis added). This Court should affirm the district court's dismissal of the amended complaint for untimely filing of the FTCA administrative claim to the Government.

II. In The Alternative, The Plaintiff's Failure To Exhaust His Administrative Remedies Before Filing Suit Mandates Dismissal Of The Suit.

A. Relevant Facts

By letter dated March 15, 2002, the plaintiff initiated an FTCA administrative claim for alleged tort injuries

resulting from the *Bakowski I* defendants' use of the May 15, 1998 denial letter in support of their motion to dismiss. On April 26, 2002, the plaintiff filed the instant suit.

B. Governing Law and Standard of Review

The FTCA requires exhaustion of administrative remedies before the filing of suit. 28 U.S.C. § 2675(a) provides, in pertinent part, that "[a]n action shall not be instituted [under the FTCA] . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall . . . be deemed a final denial of the claim for purposes of this section." Presentment of an administrative claim and exhaustion of that remedy are jurisdictional and cannot be waived. *McNeil v. United States*, 508 U.S. 106, 111-13 (1993). Thus, a plaintiff's failure to comply with § 2675(a) mandates dismissal of all causes of action cognizable under § 1346(b) of the FTCA. *Contemporary Mission, Inc. v. United States Postal Serv.*, 648 F.2d 97, 104 (2d Cir. 1981).

The defendants raised the plaintiff's failure to exhaust in the district court, *see* Record # 38 at 1-4, but the district court did not address the issue in granting the defendants' motion to dismiss the amended complaint, which set forth FTCA causes of action only. Nevertheless, this Court is "'free to affirm an appealed decision on any ground which finds support in the record.'" *In re Certain Underwriter,*

294 F.3d 297, 302 (2d Cir. 2002) (quoting *Beal v. Stern,* 184 F.3d 117, 122 (2d Cir. 1999)).

C. Discussion

The plaintiff filed his complaint on April 26, 2002. GA 3. His pleading states that "[t]his case is also pending as an administrative claim under the [FTCA]. The FTCA contains a *mandatory* six-month administrative investigation and settlement period." PA-4 at 4 (emphasis added). The only FTCA claim mentioned by the plaintiff is his March 15, 2002 letter, a copy of which was appended to his complaint. Assuming for purposes of this appeal that the letter is legally sufficient as an FTCA claim, the plaintiff did not wait for denial of his FTCA claim before filing suit. The Supreme Court has held that the compulsory exhaustion language of § 2675(a) is "unambiguous" and that "the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process." *McNeil,* 508 U.S. at 111-12. As the *McNeil* Court explained:

> Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

Id. at 112. Exhaustion of administrative remedies is a jurisdictional prerequisite, and the plaintiff's failure to exhaust his FTCA remedies before filing suit provides the Court with an alternative basis for affirming the entry of judgment for the defendants.

CONCLUSION

For the foregoing reasons, the judgment of the district court for the defendants should be affirmed.

Dated: June 13, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY

LISA E. PERKINS
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY (of counsel)

ADDENDUM OF STATUTES

28 U.S.C. § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2401(b)

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2675(a)

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and

his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.