United States of America v. SLSCO, LP et al

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK UNITED STATES OF AMERICA, ex rel. MICHAEL MCSHERRY and LISA PALMA MCSHERRY,

Plaintiffs/Relators, -against- SLSCO, L.P. (DBA SLSCO, LTD. AND/OR SULLIVAN LAND SERVICES, LTD.); TODD P. SULLIVAN; JOHN R. SULLIVAN; WILLIAM W. SULLIVAN; BAUMGARDNER HOUSE RAISING, LLC (DBA BAUMGARTNER HOUSE LIFTING); ANDREW W. BAUMGARDNER; THE CITY OF NEW YORK; THE NEW YORK CITY DEPARTMENT OF BUILDINGS; THE NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION; THE NEW YORK CITY YORK CITY BUILD IT BACK; and JOHN DOES NUMBER ONE THROUGH TEN, fictitious names, real names unknown, individuals or entities submitting or facilitating False Claims as set forth herein;

Defendants.

18-CV-5981 (ARR) (SLT) NOT FOR ELECTRONIC OR PRINT PUBLICATION OPINION & ORDER

ROSS, United States District Judge: bring this action pursuant to the federal 9 et seq., and the New York False Claims Act , N.Y. State Fin. Law § 187 et seq. Now before me is a qui tam claims against 1

for failure to state a claim or plead fraud with the requisite particularity. Because the Relators have

1 The City correctly contends that named defendants New York City Department of Buildings, Housing Recovery, and New York City Build it Back are not suable entities, and that the only see agencies are not suable entities, and thus, the prop failed to state a claim under 31 U.S.C. § 3729(a)(1)(A) or § 3729(a)(1)(C), and because the City is not subject to suit under the NYFCA, I grant the Ci the City.

BACKGROUND After Hurricane Sandy damaged thousands of homes in 2012, Congress allocated funds to the City so that it could elevate homes vulnerable to damage from future hurricanes. Compl. ¶¶ 32 34. The McSherrys applied to have their home elevated and the City approved their application,

assigning defendants SLSCO, L.P. and Baumgardner House Raising (collectively, along with Todd P. Sullivan, John R. Sullivan, William W. Sullivan, and Andrew W. Baumgardner, Id. ¶¶ 25, 35 36.

formula dictated that the Contractors would be paid twice that amount. Id. ¶¶ 38 39, 43 46, 46

n.7. These internal processes also required the Contractors to set forth any change to a SOW in an updated SOW or a Change Order, and required the City to review any variance in work or the amount the Contractors would be paid. Id. ¶¶ 40, 47. The McSherrys contend that the Contractors fraudulently applied for and received payment for work that they either did not perform, performed incorrectly or with deficient materials, or for which they received duplicative payments. Id. ¶ 49. They allege that the Contractors installed wooden stairs even though the SOW reflected metal stairs, and that the Contractors applied for and received payment for installing the more expensive metal stairs. Id. ¶¶ 52 65. The Contractors applied for and received payment for installing new fiber cement siding, the Relators allege, but in fact installed only excess scrap siding from another home. Id. ¶¶ 66 69. Despite never installing shrubs reflected in the SOW, the McSherrys allege, the Contractors applied for and received payment for installing those shrubs; after the Relators successfully demanded that the Contractors install the shrubs, the Contractors applied for and received payment for the shrubs again, rendering that payment duplicative. Id. ¶¶ 72 79. The McSherrys allege that although the Contractors applied for and received payment for new smoke detectors, they never installed those detectors. Id. ¶¶ 81 85. The Contractors allegedly applied for and received payment for installation of certain siding,

but they installed it incorrectly, rendering it not fire resistant and voiding its warranty. Id. ¶¶ 87 99. Although the Contractors applied for and received payment for the installation of fire-resistant

fiber cement trim, the Relators allege, they in fact installed less expensive, non-fire-resistant material. Id. ¶¶ 103 10. Similarly, although the Contractors applied for and received payment for the installation of fireproof taped sheetrock, the McSherrys allege, they installed less expensive, non-fireproof, non-taped sheetrock instead. Id. ¶¶ 112 16. Finally, the Relators allege that the Contractors applied for and received payment for the installation of triple-lined flue pipe, but they in fact installed only single-walled flue pipe, which is less expensive and violates the New York City Fire Code. Id. ¶¶ 123 34.

The McSherrys further allege that the City was aware of and facilitated these fraudulent payments. Id. ¶ 51. Specifically, they allege that City employees attended a walkthrough that was f money from the City to the Contractors, and that the City in fact certified the home for occupancy despite flaws in the Id. ¶¶ 140, 144, 150. They also allege that they notified the City of the excessive and fraudulent nature of the charges submitted by the Contractors. Id. ¶ 148. By paying claims for work that was either not completed or completed defectively, the McSherrys allege, the Id. ¶¶ 151 60.

LEGAL STANDARD There are tw submit or cause the submission of a claim for payment to the government, and the claim for

United States ex rel. Chorches for Bankr. Est. of Fabula v. Am. Med. Response, Inc., 865 F.3d 71, 83 (2d Cir. 2017) (quoting Hagerty ex rel. U.S. v. Cyberonics, Inc., 844 F.3d 26, 31 (1st Cir. 2016)). The defendant must also act knowingly that is, either with actual knowledge, deliberate ignorance of the

truth, or reckless disregard of the

truth. 31 U.S.C. § 3729(a)(1)(A); id. United States ex rel. Schutte v. SuperValu Inc., 143 S. Ct. 1391,

1400 (2023) (quotatio aware of a substantial risk that their statements are false, but intentionally avoid taking steps to

Id. rs to defendants Id. at 1401. In assessing scienter, t thought when submitting the false claim not what the defendant may have thought after

Id.

To survive a motion to dismiss when contending that a defendant caused a false claim to be submitted to t

U.S. ex rel. Arnstein v. Teva Pharms. USA, Inc., No. 13-CV-3702, 2019 WL 1245656, at *27 (S.D.N.Y. Feb. 27, 2019) (quoting United States ex rel. Schmidt v. Zimmer, Inc., 386 F.3d 235, 244 45 (3d Cir. 2004)); see also U.S. ex rel. , 162 F. Supp. 3d 186, 19

Allison Engine Co., Inc. v. U.S. ex rel. Sanders, 553 U.S. 662, 672 (2008))). To state a claim of conspiracy to violate the FCA under 31 U.S.C. § 3729(a)(1)(C),

a false or fraudulent claim allowed or paid by the United States and (2) one or more conspirators United States ex rel. CKD Project, LLC v. Fresenius Med. Care Holdings, Inc., 551 F. Supp. 3d 27, 48 (E.D.N.Y. 2021) (quoting United States v. Spectrum Painting Corp., No. 19-CV-2096, 2020 WL 5026815, at *15 (S.D.N.Y. Aug. 25, 2020)), aff d, No. 21-2117, 2022 WL 17818587 (2d Cir. Dec. 20, 2022). The first prong of the test for conspiracy requires the relator to allege that the defendant and the entity who submitted U.S. ex rel. Ladas v. Exelis, Inc., 824 F.3d 16, 27 (2d Cir. 2016) (quotation marks omitted); see also United States ex rel. Ibanez v. Bristol-Myers Squibb Co. an agreement that made it likely there would be a violation of the FCA; they must show an agreement was made in order to

Because qui tam complaints filed under the FCA are claims of fraud, they are subject to Chorches, 865 F.3d at 81 (quoting Fed. R. Civ. P. 9(b)).

fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4)

Ladas, 824 F.3d at 25 (quotation marks omitted). A qui tam Chorches, 865 F.3d at 93. The adequacy of particularized allegations under Rule 9(b), however, - and context-specific, and the Second Circuit has recognized an Id. at 81 82 (quotation marks omitted). Under those

cir plausible allegations . . . that lead to a strong inference that specific claims were indeed submitted

and that information about the details of the claims submitted are peculiarly within the opposing Id. at 82, 93 (quotation marks omitted).

Liss v. Heritage Health &

Hous., Inc., No. 19-CV-4797, 2023 WL 2267366, at *5 (S.D.N.Y. Feb. 28, 2023) (quotation marks omitted). The state law bars qui tam actions against local governments. N.Y. State Fin. Law § 190(2)(a).

DISCUSSION The Relators acknowledge that their Complaint fails to allege facts supporting the ECF No. 37. They similarly recognize that the City is not suable under the NYFCA. Id. at 18; see

The sole remaining issue is therefore whether the Relators stated a claim that the City knowingly presented a false or fraudulent claim to the federal government, or caused such a claim to be presented. 2

For the forthcoming reasons, I hold that they have failed to do so. I. The complaint fails to sufficiently allege that the City submitted a false claim to the

federal government. The Relators do not contend that the City intended to misapply federal funds when it applied to Congress for Hurricane Sandy funding. Pls. because of now Id. This novel theory that an originally valid claim can later be rendered false is SuperValu, fendant thought when submitting 143 S. Ct. at 1401 (emphasis added); see also United States ex rel. Gelbman v. City of New York dismissal of complaint where ls about the eligibility status of the Medicaid claims at the time of .

The Relators rely on United States ex rel. Feldman v. van Gorp, 697 F.3d 78 (2d Cir. 2012), but that case is distinguishable. There, after a university successfully submitted an initial application for a federal grant, it deviated from the purpose of that grant yet represented in its subsequent renewal applications that nothing had changed since the initial application. Id. at 80 84. A jury found the defendants liable based on the renewal applications not based on the initial

application and the Second Circuit affirmed. Id. at 85 86, 97. This case, unlike Feldman, does not involve subsequent renewal applications. And Feldman does not stand for the proposition that

2 The Complaint does not specify this theory; rather, the Relators articulated it for the first time in their pre-motion letter. Because the argument is fully briefed, however, I consider it now in the interest of efficiency. actions following an initial application, absent any subsequent claims submitted to the federal government, can render that originally truthful application false.

pleading standards. The Relators out the details of the claims submitted

Chorches, 865 F.3d at 93. And even if they specific false claims were actually and knowingly submitted. Id. allegations support an inference that the City was negligent in ensuring the quality of the work

provided by its contractors. The fact that the Contractors may have submitted false claims cannot, the specific conduct of the person from whom the Government seeks to collect the statutory

United States v. Bornstein, 423 U.S. 303, 312 (1976). In so holding, I am cognizant

in qui tam base claims of fraud Chorches, 865 F.3d at 86 (quotation marks omitted). II. The complaint fails to sufficiently allege that the City caused the Contractors to

submit false claims. The complaint is entirely devoid of

United States ex rel. Arnstein v. Teva Pharms. USA, Inc., No. 13-CV-3702, 2019 WL 1245656, at *27 (S.D.N.Y. Feb. 27, 2019) (quotation marks omitted); see Fed. R. Civ. Pro. 9(b). Even if such allegations were present, the complaint is insufficient to support an inference that the City acted knowingly, as required by 31 U.S.C. § 3729(a)(1)(A). The occasions[] directly notified . . . the City Agencies in person, or by writing, of the excessive and fraudulent natur crucial detail it does not specify, for example, whether the McSherrys notified the City of these deficiencies before the City approved the release of funds to the Contractors. Compl. ¶ 148. Nor is their allegation that City employees were present at the Walkthrough sufficient to support an inference that the City details regarding what City employees observed at the walkthrough. Id. ¶ 144. Although the FCA

fraud cla Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1477 (2nd Cir. 1995). Here, the

Relators have not alleged specific statements or conduct such as what they told the City, or what City employees observed and have therefore failed to plead facts supporting an inference that is satisfied. 3

CONCLUSION For reasons set forth above, I conclude that the Relators have failed to state a claim and dismiss their claim against the City under 31 U.S.C. § 3729(a)(1)(A) without prejudice. See ATSI District courts typically

3 The Relators rely on United States v. Saavedra 37 (2d Cir. 2016), for the proposition that FCA claims can be brought regarding federal funds intended to benefit third 9, but Saavedra merely applied this previously recognized rule, and says nothing of what is required for a relator to sufficiently allege causation when alleging that a defendant caused such a false claim to be submitted. grant plaintiffs at least one opportunity to plead fraud with greater specificity when they dismiss under Rule 9(b). The Rela der 31 U.S.C. § 3729(a)(1)(C) is likewise dismissed without prejudice. Their claim under the NYFCA, meanwhile, is dismissed with prejudice See Williams v. Bank of N.Y. Mellon Tr. Co., 13-CV-6814, 2015 WL 430290, at *6 (E.D.N.Y. Feb. 2, 2015) (citing United States ex rel. Pilon v. Martin

Marietta Corp, 60 F.3d 995, 1000 (2d Cir. 1995)).

SO ORDERED.

/s/ Allyne R. Ross United States District Judge Dated: September 15, 2023 Brooklyn, New York