

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER T. BORN, M.D. : CIVIL ACTION
 :
 v. :
 :
 WILLIAM IANNAcone, M.D., :
 ROBERT DALSEY, M.D., :
 LAWRENCE DEUTSCH, M.D. :
 JOHN CATALANO, M.D., and :
 THE COOPER HEALTH SYSTEM :
 d/b/a COOPER HOSPITAL/ :
 UNIVERSITY MEDICAL CENTER : NO. 97-5607

MEMORANDUM AND ORDER

HUTTON, J.

June 2, 1999

Presently before this Court is the Motion of Defendant The Cooper Health System ("Cooper" or "Defendant") to Dismiss Plaintiff's Qui Tam Claim (Docket No. 26), the Response of Plaintiff, Christopher T. Born, M.D. ("Born" or "Plaintiff"), Cooper's letter-brief (Docket No. 39), and Plaintiff's Sur-Reply (Docket No. 40). For the reasons stated below, the Defendant's Motion is **DENIED**.

I. BACKGROUND

On February 9, 1998, Plaintiff Christopher T. Born, M.D. ("Born" or "Plaintiff") filed his First Amended Complaint against various Defendants including a violation of the False Claims Act, 31 U.S.C. § 3730(h) (Count IV) against The Cooper Health System ("Cooper" or "Defendant"). On September 30, 1998, this Court

dismissed the Plaintiff's False Claims Act and Qui Tam Claim of his Amended Complaint because of the Plaintiff's failure to submit a timely response to the Defendants' Motions to Dismiss. On December 7, 1998, this Court granted Plaintiff's motion for reconsideration and vacated its earlier order dismissing Plaintiff's False claims Act and Qui Tam Claim (Count IV) of Plaintiff's Amended Complaint. The Court now considers Plaintiff's False claims Act and Qui Tam Claim (Count IV) of his Amended Complaint.

II. DISCUSSION

A. Legal Standard

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),¹ this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v.

³. Rule 12(b)(6) provides that:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

B. Defendant's Motion

In the present motion, Cooper asserts that the qui tam claim under Count IV should be dismissed. Cooper raises three general issues. First, Cooper contends that Born has failed to state a qui tam cause of action under § 3730(h). Cooper argues that Born has not alleged the requisite elements for this "whistleblower" claim. Second, Cooper claims that Born has failed to plead fraud with the requisite particularity. Third, and finally, Cooper alleges that Born has failed to plead that the Eastern District is the proper venue for his qui tam action. Because the Court has already found that venue is proper in the Eastern District of Pennsylvania, the Court need not consider Cooper's third argument. See Born v. Iannocone, Civ.A. No. 97-5607, 1998 WL 297621, *6-7 (E.D. Pa. Jun.3, 1998) (denying Cooper's motion to transfer venue to District of New Jersey). The Court now considers the first two issues raised by Cooper in the instant motion.

1. Qui Tam Action under § 3730(h)

Title 31, U.S.C. § 3729 creates liability for any person who presents false claims to the federal government for payment. Section 3730 allows a private person to bring a civil action on behalf of the Government for violations of § 3729 (i.e., a "qui tam action"). Section 3730(h)-- sometimes called the "whistleblower" provision of the False Claims Act-- "prevents the harassment, retaliation, or threatening of employees who assist in or bring qui tam actions." Zahodnick v. IBM Corp., 135 F.3d 911, 914 (4th Cir.1997). It provides:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h). Three elements exist under § 3730(h) that constitute a prima facie case: "[A]n employee must prove that (1) he took acts in furtherance of a qui tam suit [i.e. engaged in 'protected activity']; (2) his employer knew of these acts; and (3) his employer [retaliated against] him as a result of these acts." Zahodnick, 135 F.3d at 914.

Count IV of Born's Amended Complaint has established all three elements of a prima facie case under § 3730(h). First, he was engaged in an activity protected by the False Claims Act when

he consulted with counsel regarding Cooper's allegedly illegal policies and when he refused to allow UOS physicians to sign the charts of patients they had not seen. See e.g., United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 737 (D.C. Cir. 1998). Second, the Amended Complaint satisfies the requirement that Cooper must have known that Born was engaging in such conduct, since it specifically alleges that Cooper knew about Born's protected activities. Whether Cooper had knowledge of Born's protected activity is an issue of fact that cannot be resolved on a motion to dismiss. See, e.g., Wilkins v. State of Ohio, 885 F. Supp. 1055, 1061 (S.D. Oh. 1995). Third, Born has sufficiently plead that Cooper retaliated against him because of his protected activity. Although Born admits that he was never discharged, he claims that Cooper gave him the "choice" of either accepting unfair employment terms with Cooper, or having his practice and reputation "maliciously interfered with." Thus, the Court finds that Count IV of Plaintiff's Amended Complaint sufficiently pleads a qui tam claim under § 3730(h).

2. Fraud Pleading

Cooper argues that Count IV of Born's Complaint must be dismissed for failure to plead his allegations of fraud with particularity as required by Federal Rule of Civil Procedure 9(b). Fed. R. Civ. P. 9(b). This Court must disagree.

The purpose of Rule 9(b) is "to place the defendant on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786 (3d Cir. 1984), cert. denied, 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985). In Seville, the Court of Appeals held that, as long as there is precision and some measure of substantiation in the allegations, the complaint must stand. See Seville, 742 F.2d at 791; see also Berk v. Ascott Inv. Corp., 759 F.Supp. 245, 254 (E.D. Pa. 1991). Although date, place, or time allegations will provide precision, substantiation, and notice, "nothing in the rule requires them." 742 F.2d at 791.

Born has satisfied the rule's requirement that he put Cooper on notice of the precise misconduct with which it is charged. In his complaint, Born alleges fraudulent conduct by Cooper. Born alleges that Cooper required mandatory physiatrist consultation to Cooper-employee physiatrists, double billing of residents' salaries, and the requirement that physicians sign the charts of patients they had not personally treated. (Am. Compl. ¶¶ 19-21.) He also alleges that Cooper acted in collusion with the other defendants, thereby adequately pleading conspiracy. (Am. Compl. ¶ 22). Cooper has more than adequate notice of the alleged fraud, and the allegations are precise enough to support a claim for fraud. Cf. In re Midlantic Corp. Shareholder Litig., 758

F.Supp. 226, 231 (D.N.J. 1990) ("If the pleaded facts and supporting allegations permit the inference of a colorable claim for fraud and afford the defendant notice as to which actions or communications are alleged to have been fraudulent, the complaint will withstand a motion to dismiss."). Thus, Cooper's motion is denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 2nd day of June, 1999, upon consideration of the Motion of Defendant The Cooper Health System ("Cooper" or "Defendant") to Dismiss Plaintiff's Qui Tam Claim (Docket No. 26), the Response of Plaintiff, Christopher T. Born, M.D. ("Born" or "Plaintiff"), Cooper's letter-brief (Docket No. 39), and Plaintiff's Sur-Reply (Docket No. 40), IT IS HEREBY ORDERED that the Defendant's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.