

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

UNITED STATES OF AMERICA	:	CIVIL ACTION
ex rel., KEVIN BRENNAN	:	
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
THE DEVEREUX FOUNDATION and	:	
DEVEREUX PROPERTIES, INC.	:	NO. 01-4540
	:	
Defendants	:	
	:	

Newcomer, S.J. January , 2003

O P I N I O N

Presently before the Court is Defendants' Motion to Dismiss, Plaintiff's response and the parties' supplemental replies. For the reasons set forth below, Defendants' Motion is denied, in part, and granted, in part.

BACKGROUND

This action is brought under the qui tam provisions of the False Claim Act, 31 U.S.C. §§ 3729 et seq. Plaintiff, Kevin Brennan ("Brennan"), brings suit on his own accord as, after review, the government opted against intervention. Brennan, a former employee of the Defendant, the Devereux Foundation ("Foundation"), alleges that the Foundation submitted fraudulent claims for payment and cost reports to various Medicaid and Medicare payors for treatment and rehabilitation services

provided by the Foundation. Brennan first notified the Foundation of these billing irregularities in June of 1999. Shortly thereafter, the Foundation disclosed the irregularities to the payors and continued to do so throughout 2000 and 2001. In April of 2000 Brennan notified the United States Department of Health and Human Services (HHS) of these alleged billing irregularities.

On July 25, 2002, the Defendants moved this Court to dismiss Plaintiff's Counts One through Six for improper jurisdiction, lack of standing and failure to plead with particularity. At the Plaintiff's request, the parties were afforded a discovery period of one month to gather the facts necessary to properly argue the jurisdictional issue. The Plaintiff does not contest the Defendants' assertion that he is barred from bringing common law claims (Counts Two through Six) for lack of standing. Therefore, this Court's analysis is limited to a determination of whether subject matter jurisdiction exists and whether the Plaintiff pleaded his False Claims Act Claim with sufficient particularity.

DISCUSSION

I. False Claims Act

A. Legal Standard

In 1986, Congress amended the False Claims Act (FCA) to

"resolve the tension between...encouraging people to come forward with information and...preventing parasitic lawsuits." Cooper v. Blue Cross and Blue Shield of Florida, Inc. 19 F.3d 562, 565 (11th Cir. 1994). The result was a provision (31 U.S.C. § 3730(e)(4)) which establishes a jurisdictional bar against certain FCA qui tam actions. Specifically, 31 U.S.C. § 3730(e)(4) provides as follows:

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

In assessing whether subject matter jurisdiction exists in any given qui tam scenario under § 3730(e)(4), courts are best served by an application of the following three step inquiry: (1) Have the allegations made by the plaintiff been "publicly disclosed"? (2) If so, is the lawsuit "based upon" that publicly disclosed information? (3) If so, is the plaintiff an "original source" of the information? Cooper, 19 F.3d at 564 n. 4. The following analysis applies this approach to the case at hand.

B. Analysis

1. "Public Disclosure"

We begin our analysis with a determination of whether there was a "public disclosure" of the Foundation's alleged

fraud. Such a determination is vital to the task at hand. A finding of no public disclosure means that § 3730(e)(4)(A) has been satisfied and, therefore, a court has not been divested of subject matter jurisdiction. Conversely, a finding of public disclosure places a burden on a plaintiff to prove either that the lawsuit was not based upon the publically disclosed information or that the plaintiff was an original source of the publically disclosed information.

Not surprisingly, the Defendants here argue that the Foundation publically disclosed the transactions constituting the alleged fraud by voluntary disclosures to the governmental delegates responsible for processing, paying and auditing the Foundation's Medicaid claims ("intermediary payors"). In support of this proposition, the Defendants rely exclusively on the Seventh Circuit's opinion in United States v. Bank of Farmington, which holds "public disclosure within the meaning of § 3730(e)(4)(A) [occurs] when the disclosure is made to one who has managerial responsibility for the very claims being made."¹ Defendant's Brief p. 6 citing United States v. Bank of Farmington, 166 F.3d, 853, 861 (7th Cir. 1999).

After careful review, this Court concludes that

¹ For the purposes of considering the Defendants' argument, the Court will assume that the intermediary payors which the Foundation notified of the alleged fraudulent transactions have managerial responsibility for the claims made here.

Defendant's argument is without merit. The Defendants' argument is wholly based on the Seventh Circuit's interpretation of public disclosure as presented in the Farmington opinion. Noticeably absent from this argument is any mention of a concurring Third Circuit opinion. This is the case as the Third Circuit does not concur with the Seventh Circuit's interpretation of what constitutes public disclosure under § 3730(e)(4)(A).² Instead, the Third Circuit strictly adheres to the language which Congress used in describing events which constitute public disclosures. "As noted, the qui tam provision refers to 'the public disclosure of allegations or transactions in a criminal, civil, or administrative, or Government Accounting Office (sic) report, hearing, audit, or investigation, or from the news media'...[t]hus, in order to fall within this language, a disclosure (1) must be 'public' and (2) must occur in one of the specified contexts." United States of America ex rel. Mistick PBT, et al v. Housing Authority of the City of Pittsburgh, 186 F.3d 376, 382-83 (3d Cir. 1999). Clearly, The Defendants' notification to the intermediary payors does not fit into one of those mediums delineated by Congress as giving rise to public disclosure. Moreover, neither of the parties ever indicate that the notifications ever became public. "Information that the

² Also noticeably absent from Defendants' brief is any mention of the controlling Third Circuit case law which contradicts their theory of the law in this area.

government 'has,' but that was never publically disclosed, does not bar a qui tam suit." United States of America, ex rel. Cantekin v. University of Pittsburgh, 192 F.3d 402, 408 (3d. Cir. 1999). Thus, it is abundantly clear to this Court under the Third Circuit analysis that the Defendants' notification to the intermediary payers fails to constitute a public disclosure. A finding to the contrary would contradict Congress' legislative intent.

A finding of no public disclosure makes any further consideration of § 3730(e)(4)(A)'s jurisdictional requirements unnecessary. Therefore, the Court will dispense with any further discussion of this topic except to say that contrary to the Defendants' assertions, this Court was not divested of subject matter jurisdiction as a result of § 3730(e)(4)(A)'s requirements.

II. Standing

Plaintiff's Counts Two through Six contain common law claims against the Defendants on behalf of the United States. The Defendants have argued, and the Plaintiff has conceded, that the Plaintiff lacks proper standing to pursue these claims. Therefore, they shall be dismissed without further discussion.

III. Stated with Particularity?

The Federal Rules of Civil Procedure provide “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”

Fed.R.Civ.P. 9(b). The purpose of such a requirement is “to place the defendants on notice of the precise misconduct with which they are charged...” Seville Inds. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984).

The Defendants in the instant case claim the Plaintiff has failed to plead with particular specificity. Such a claim is unfounded. The Plaintiff has provided sufficient facts to place the Defendants on notice as to those claims against them. In fact, the Defendants prove this point by addressing some specific transactions, which the Plaintiff claims are fraudulent, in support of their instant Motion to Dismiss. Therefore, Defendants’ motion is denied.

AN APPROPRIATE ORDER FOLLOWS

Clarence C. Newcomer, S.J.

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ORDER

AND NOW, this day of January, 2003, upon consideration of the Defendants' Motion to Dismiss, the Plaintiff's response and the parties subsequent briefs, it is hereby ORDERED that Defendants' Motion is GRANTED, in part, and DENIED, in part. Plaintiff's Counts Two through Six are DISMISSED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.