

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

ARNOLD G. SHOWELL, : CIVIL ACTION  
 : NO. 97-1200  
Plaintiff, :  
 :  
v. :  
 :  
ACORN HOUSING CORP. ET AL., :  
 :  
Defendants. :

EDUARDO C. ROBRENO, J.

September 17, 1997

M E M O R A N D U M

I.

Pro se plaintiff Arnold G. Showell filed a five-count complaint alleging violations of the federal civil rights statutes and sundry state laws based upon his discharge by defendants from his job as a loan counselor. Named as defendants are Acorn Housing Corporation of Connecticut, Acorn Housing Corporation of Pennsylvania, Doris Latorre, and Diana Lynch (hereinafter "the defendants"). The corporate defendants are nonprofit organizations which assist low-and-moderate income, first-time homebuyers in their applications to the Settlement Grant Program administered by the City of Philadelphia's Office of Housing & Community Development ("OHDC"). The individual defendants are employees of the corporate defendants. Jurisdiction is predicated upon the existence of a federal question under 28 U.S.C. § 1331, and upon the supplemental jurisdiction statute, 28 U.S.C. § 1367.

Defendants have moved to dismiss the complaint on two grounds: (1) first, the defendants contend that plaintiff has failed to state a claim under Fed. R. Civ. P. 12(b)(6) since he has not alleged any set of facts as to count 4 which could establish state

action under the federal civil rights statute, 42 U.S.C. § 1983<sup>1</sup>; and (2) second, the defendants argue that because plaintiff has brought no other claims for federal relief in counts 1, 2, 3 and 5,<sup>2</sup> the Court should dismiss these sundry state law claims for lack of supplemental jurisdiction.

Plaintiff argued for the first time in his response to the motion to dismiss, and again during oral argument, that the organizational defendants, although admittedly private nonprofit corporations, are state actors under § 1983. According to plaintiff, there are two bases for this contention: (1) the organizational defendants allegedly receive funds to operate their business from the federal and state governments; and (2) one of the individual defendants, Diana Lynch,<sup>3</sup> the supervisor who discharged plaintiff from his employment with defendant Acorn Housing

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<sup>1</sup>Count 4 of the complaint is captioned "Property Interest and Liberty Interest" and alleges that "as a direct result of the defendant Acorn [Housing Corporation of] Pennsylvania and defendant Diana Lynch, [plaintiff] has sustained and will in the future be hindered in his efforts to obtain employment," damaging his "property interest in [his] continued employment" and a "liberty interest in the safeguarding of [his] honor, reputation and integrity. . ."

<sup>2</sup>Count 1 of the Complaint is captioned "Fraud," and alleges that the defendants prepared and submitted a false application for a settlement grant with OHDC on behalf of a client. Count 2 is captioned "Act Contrary to Public Policy" and essentially repeats the allegations in Count 1. Count 3 is captioned "Exception to the Employment-At-Will Doctrine," and alleges that the defendants "negligently, willfully, intentionally, recklessly, and fraudulently" instructed plaintiff to engage in activities as a loan counselor in violation of the Pennsylvania Real Estate Licensing Act. Count 5 is a claim for wrongful discharge. Moreover, at oral argument, plaintiff conceded that he was withdrawing any claims under the False Claims Act. See 28 U.S.C. § 3729 et seq.

<sup>3</sup>Plaintiff has not alleged that the other individual defendant, Doris Latorre, was a state actor under § 1983.

Corporation of Pennsylvania, was trained by OHDC officials, was bound by the "terms and policies" of OHDC as to advising loan applicants for the OHDC's Settlement Grant Program, and therefore, according to plaintiff, acted as an "agent" of OHDC.

The Court has carefully considered the pleadings, the respective submissions of the parties on the state action issue, and the legal positions taken by pro se plaintiff and counsel for defendants during oral argument. For the reasons that follow, the Court will grant the motion to dismiss.

## II.

In Boyle v. Governor's VOAC, 925 F.2d 71, 74 (3d Cir. 1991), the Third Circuit counselled district courts that ". . . where the motion to dismiss is based on the lack of state action [under 42 U.S.C. § 1983], dismissal is proper only pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim and not under Rule 12(b)(1) for lack of [subject matter] jurisdiction." Boyle, 925 F.2d at 74 (citing Kulick v. Pocono Downs, 816 F.2d 895, 897-98 (3d Cir. 1987) (other citations omitted)). Accordingly, the Court will treat the motion of the defendants to dismiss on the basis that the complaint does not allege state action pursuant to § 1983 as a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a motion to dismiss for failure to state a claim, the Court must "consider only those facts alleged in the complaint and accept all of the allegations as true," ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994), and must view the

allegations in the complaint in the light most favorable to the non-moving party. See Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal is not appropriate unless it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); See also CCAIR, 29 F.3d at 859 (citing D.P. Enters, Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984)). A complaint may be dismissed when the facts plead and the reasonable inferences drawn therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179 (3d Cir. 1988). Moreover, in deciding a motion to dismiss under Rule 12(b)(6), the district court is "not required to accept legal conclusions either alleged or inferred from the pleaded facts." Kost v. Kokakiewicz, 1 F.3d 176, 183 (3d Cir. 1993).

42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

"Although a private [party] may cause a deprivation of. . . a right, [the party] may be subjected to liability under § 1983 only when it does so under color of law." Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156 (1978). The Supreme Court has made clear that "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' requirement

under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 797 n. 7 (1966) (quoted in Lugar v. Edmonson Oil Co., 457 U.S. 922, 928 (1982) [hereinafter "Lugar"], and Rendell-Baker v. Kohn, 457 U.S. 830 (1982)). The "state action principle [under § 1983] is succinctly stated as follows: '[A]t base, constitutional standards are invoked only when it can be said that the [government] is responsible for the specific conduct of which the plaintiff complains.'" Mark v. Borough of Hatboro, 51 F.3d 1137, 1141-42 (3d Cir.) (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004) (1982) (alterations in original), cert. denied, 116 S.Ct. 165 (1995)). "Put differently, deciding whether there has been state action requires an inquiry into whether 'there is a sufficiently close nexus between the State and the challenged action of [the defendant] so that the action of the latter may be fairly treated as that of the state itself.'" Borough of Hatboro, 51 F.3d at 1142 (Blum v. Yaretsky, 457 U.S. at 1004) (internal citation omitted).

The Supreme Court has endorsed at least three tests to determine whether the actions of a nongovernmental party may constitute state action under § 1983: (1) the public function test; (2) the joint action or conspiracy test and (3) the symbiotic relationship test. See Borough of Hatboro, 51 F.3d 1137, 1142-43 (3d Cir. 1995). The lines which separate these tests are more "nice" than "bright," and, in the end, ". . . the test to be applied depends upon the circumstances of the case and the Supreme Court has instructed lower courts [before applying any one test] to

investigate completely the facts of each case." Goussis v. Kimball, 813 F.Supp. 352, 357 (E.D. Pa. 1993) (citing Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) and Community Med. Center v. Emergency Med. Services, 712 F.2d 878, 880 (3d Cir. 1993)). Under none of these tests can the defendants be deemed to be state actors.

Here, plaintiff asserts that the defendants are state actors under § 1983 since, according to plaintiff, the defendants receive funds from the federal government through the Department of Housing & Urban Development ("HUD"), and also receive funds from the state government through OHDC. Even assuming that plaintiff has asserted a deprivation of a constitutional right under § 1983,<sup>4</sup> the Court nevertheless concludes that plaintiff cannot establish state action under § 1983 based upon the funding by governmental sources of defendants' business. To the contrary, in both Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982), and Blum v. Yaretsky, 457 U.S. 991, 1001 (1982), the Supreme Court rejected a similar argument and found instead that the mere allegation that a private organization receives government funding cannot in and of itself transform the decisions of that private actor into state action within the meaning of § 1983. See Rendell-Baker, 457 U.S. at 840 ("But in Blum v. Yaretsky, we held that the similar dependence of the nursing homes [on government funds] did not make the acts of the physicians and nursing home administrators acts of the State, and we conclude [likewise in Rendell-Baker v. Kohn] that the [private] school's

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<sup>4</sup>At oral argument, plaintiff asserted that the defendants violated his procedural due process rights by discharging him without affording him an opportunity to be heard.

receipt of public funds does not make the decisions [of the private school] acts of the State."); See also Krynicky v. University of Pittsburgh, 742 F.2d 94, 99-100 (3d Cir. 1984) (discussing Rendell-Baker and Blum).<sup>5</sup> Therefore, plaintiff's naked allegation that being the recipient of government funds transforms a private party into a state actor must fail.

### III.

Plaintiff next asserts that the defendants are state actors under the "joint participation" theory. Plaintiff contends that Diana Lynch, plaintiff's immediate supervisor who terminated his employment with defendant Acorn Housing Corporation of Pennsylvania, was trained by OHDC officials and was bound by the "terms and policies" of OHDC in advising loan applicants for the OHDC's Settlement Grant Program. In this vein, plaintiff repeatedly asserted during oral argument that Diana Lynch acted as an "agent" of OHDC.

In Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (hereinafter "Edmonson"), the Supreme Court set forth the following two-prong test for determining whether state action may

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<sup>5</sup>More recently, in Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40 (4th Cir. 1993), the Fourth Circuit found that granting plaintiff leave to amend was futile and that dismissal was therefore proper under Fed. R. Civ. P. 12(b)(6). Relying upon Rendell-Baker and Blum, the Fourth Circuit found that plaintiff could not show under any set of facts that the nonprofit organization's decision to discharge plaintiff was state action simply because he had alleged that the state government had provided funding to the private nonprofit corporation. See Watts-Means, 7 F.3d at 43. Here, unlike the plaintiff in Watts-Means, pro se plaintiff has not even alleged anywhere in the complaint that the constitutional deprivation of which he now complains, i.e., the decision by the defendants to terminate his employment, constituted state action under § 1983.

be predicated upon a theory of joint participation: "[the Court shall ask] [f]irst whether the claimed constitutional deprivation resulted from the exercise of a right or a privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor." Edmonson, 500 U.S. at 620.

Here, plaintiff cannot satisfy the first-prong under Edmonson since he has not even alleged that the specific constitutional deprivation of which he complains, i.e. that he was terminated by defendants in violation of his constitutional right to procedural due process, resulted from the exercise of a right or a privilege having its source in state authority. In other words, to survive a motion to dismiss under the joint participation theory, plaintiff must allege not that the government entity was involved in the operation or administration of the private business, but rather that the government entity played a role in the specific constitutional violation claimed, i.e. the alleged violation of his due process rights resulting from his termination. Since plaintiff has not alleged that the government entity was even minimally involved in the decision to terminate him, the allegation based on this theory of joint participation must fail. See e.g., Darden v. Alameda County Network of Mental Health Clients, 1995 WL 616633 (N.D. Cal. 1995) (finding that dismissal was proper under Rule 12(b)(6) where civil rights complaint under § 1983 did not allege that the government entity participated even minimally in the decision by private actor to terminate plaintiff's employment); Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40, 43

(4th Cir. 1993) (finding that plaintiff could not establish joint participation theory of state action under § 1983 where the complaint did not allege that the government entity was even minimally involved in the decision by private actor to terminate his employment). Accordingly, the Court will grant the motion to dismiss as to count 4 and will dismiss that count without prejudice.

IV.

As to the sundry state law claims raised by plaintiff in the other counts of the complaint (Counts 1, 2, 3 and 5), the Court will dismiss those claims without prejudice. In cases involving federal claims and appended state law claims "if the federal claims are dismissed before trial. . . the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715 (1966). See also 28 U.S.C. § 1367(c)(3). In light of the fact that plaintiff's claim under § 1983 has been dismissed pursuant to Rule 12(b)(6), and plaintiff having alleged no other basis for jurisdiction, the Court will exercise its discretion to dismiss without prejudice plaintiff's pendent state law claims.

V.

For the above reasons, the motion to dismiss is granted and the complaint is dismissed without prejudice. Pro se plaintiff is granted leave to file an amended complaint, if he so chooses, within twenty (20) days.

An appropriate order of the UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARNOLD G. SHOWELL,	:	CIVIL ACTION
	:	NO. 97-1200
Plaintiff,	:	
	:	
v.	:	
	:	
ACORN HOUSING CORP. ET AL.,	:	
	:	
Defendants.	:	

O R D E R

**And Now**, this 17th day of **September, 1997**, upon consideration of the motion of the defendants to dismiss the complaint (doc. no. 13), and pro se plaintiff's response thereto (doc. no. 14), and the motion of defendants for leave to file a reply brief in support of the motion to dismiss (doc. no. 15), and plaintiff's response thereto (doc. no. 16), and the motion by plaintiff to place the case and docket under seal (doc. no. 19), and the response of the defendants thereto (doc. no. 20), it is hereby **ORDERED** that the motion to dismiss is **GRANTED** for the reasons stated in the Court's memorandum of this date. It is **FURTHER ORDERED** that the complaint is **DISMISSED WITHOUT PREJUDICE** and plaintiff is granted leave to file an amended complaint by **October 6, 1997**, insofar as he may raise allegations as to whether the decision by defendant Acorn Housing Corporation of Pennsylvania to terminate his employment

constituted state action under 42 U.S.C. § 1983. It is **FURTHER ORDERED** that the motion of the defendants to file a reply brief is **GRANTED**. It is **FURTHER ORDERED** that the motion to place the case and docket under seal is **DENIED AS MOOT**, plaintiff having withdrawn any claims under the False Claims Act.

**AND IT IS SO ORDERED.**

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EDUARDO C. ROBRENO, J.