

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *ex rel.*)
ERVIN AND ASSOCIATES, INC.,)

Plaintiff,)

v)

THE HAMILTON SECURITIES GROUP,)
INC., *et al.*)

Defendants.)

Civil Action No. 96-CV-1258 (LFO)

Civil Action No. 99-CV-1698 (LFO) ✓

FILED

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NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

This litigation involves two now-consolidated cases. The first is a *qui tam* action brought by Ervin and Associates, Inc. ("Ervin") for the benefit of the United States against Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively, "Hamilton"). Ervin challenges an award of financial advisory contracts to Hamilton by the Department of Housing and Urban Development ("HUD"). These contracts related to the design and implementation of an \$11 billion mortgage note sale program. After investigation, the United States has elected not to pursue the action; Ervin is now going forward as the single-party plaintiff. In the second case, Hamilton has brought claims against Ervin and John Ervin, individually, for tortious interference with contractual relations, tortious interference with prospective business advantage, and abuse of process.

At issue in the *qui tam* action is Hamilton's motion to dismiss, or in the alternative, for summary judgment and defendant Williams, Adley & Company's motion to dismiss. In the second case, Ervin and John Ervin have moved to dismiss, or in the alternative, for summary

judgment. Counsel have extensively briefed the issues and argued each of the motions orally.

I. Hamilton's Motion to Dismiss, or in the Alternative, for Summary Judgment

Hamilton argues that Ervin's *qui tam* action is jurisdictionally barred because Ervin's claims were "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." 31 U.S.C. § 3730(e)(4)(A). Hamilton also contends that Ervin failed to allege fraud with the specificity required by Federal Rule of Civil Procedure 9(b), and that Ervin did not assert any loss to the Government.

It is apparent from the face of the amended complaint and the undisputed facts that Hamilton has failed to make the requisite showing that the "allegations or transactions" upon which Ervin bases its suit were disclosed in the public proceedings specified by the False Claims Act.¹ See *United States ex rel. Settemire v. District of Columbia*, 198 F.3d 913, 918 (D.C. Cir. 1999); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994). On September 6, 1995, Karen Burstein, an attorney for Asser Strategies Group, sent a letter (a copy of which is attached) to HUD Assistant Secretary for Community Planning and Development, Andrew Cuomo, complaining about Hamilton. Ervin asserts without contradiction that the Burstein letter was not provided to the HUD Office of the Inspector General or any law enforcement agency or individual until after Ervin filed this *qui tam* lawsuit on June 6, 1996.²

¹ Discovery may lead to evidence of pre-filing law enforcement actions and public disclosure not now in the record.

² On February 5, 2001, Ervin filed the "Burstein Letter Chronology." It adds nothing material to the public disclosure analysis.

Therefore, the Burstein letter was not publicly disclosed in a manner prescribed by the statute. In addition, the allegations and transactions discussed in the Housing Affairs Letter news articles (copy attached), while publicly disclosed before Ervin filed the *qui tam* action, were not sufficiently specific to form the basis for Ervin's allegations against Hamilton.

Turning to Hamilton's second contention with respect to the fraud count, Ervin's detailed complaint alleges specific wrongdoing and provides the essential information necessary to understand the allegations and defend against them. In particular, Ervin alleges on the face of its complaint that Hamilton, *inter alia*, provided false invoices to the government to support exaggerated cost estimates, Amended Complaint ¶ 260, and took actions resulting in the transfer of assets from the government to the private sector at less than fair market value, causing considerable loss to the U.S. Treasury. Amended Complaint ¶ 256.

(I. Williams, Adley & Company's Motion to Dismiss

Williams, Adley & Company moves to dismiss on the ground that Ervin failed to allege fraud with the specificity required by Federal Rule of Civil Procedure 9(b). This facial challenge to the amended complaint must also fail.

Ervin alleges that Williams, Adley gave Hamilton a kickback subcontract in exchange for Hamilton's influence in steering a HUD due diligence contract to Williams, Adley. Ervin also alleges that Hamilton used its influence over HUD on behalf of Williams, Adley to persuade HUD to double the size of the Williams, Adley due diligence contract from \$15 million to \$30 million. Ervin has, in essence, alleged that Williams, Adley obtained its contract fraudulently. "Claims for payment submitted to the government pursuant to a fraudulently obtained contract violate the [False Claims Act], even if the claims themselves do not contain false statements."

United States ex rel. Alexander v. Dynecorp, 924 F. Supp 292, 298 (D.D.C. 1996) (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943)). Therefore, Ervin has alleged fraud with the specificity required by Rule 9(b). See 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1298 (2d ed. 1990).

III. Ervin's and John Ervin's Motion to Dismiss, or in the Alternative, for Summary Judgment

In *Hamilton v. Ervin*, Ervin moves to dismiss, or in the alternative, for summary judgment contending that Hamilton's claims are grounded on information and statements protected by the litigation privilege. Ervin also asserts that Hamilton cannot show causation or loss because the HUD contract was canceled by the Government at its convenience.

While some of the statements which form the basis for Hamilton's allegations may be protected by the litigation privilege, it appears from Hamilton's complaint that these statements describe only one part of a series of activities that damaged Hamilton and eliminated the note sale program. Therefore, at this stage, prior to any discovery, it would be premature to grant Ervin's motion to dismiss. It is also too early for a decision in Ervin's favor on the causation of the cancellation of the HUD contract; Hamilton may be able to prove that Ervin's wrongful actions did cause HUD's cancellation.

John Ervin, the individual defendant in *Hamilton v. Ervin*, also moves to dismiss, arguing that his actions were taken in his capacity as President of Ervin and Associates. If Hamilton proves that John Ervin acted with malice or improper purpose outside the scope of his employment, he may be liable personally for the tort. *Nickens v. Labor Agency*, 600 A.2d 813, 20 (D.C. 1991). Consequently, his motion must also be denied.

Accordingly, it is this ²¹ 8 day of February 2001 hereby

ORDERED: that the motion to dismiss, or in the alternative, for summary judgment filed by defendants Hamilton Securities Group, Inc and Hamilton Securities Advisory Services, Inc. (Dkt. 71) is DENIED without prejudice, and it is further

ORDERED: that the motion to dismiss filed by defendant Williams, Adley & Company (Dkt. 75) is DENTED, and it is further

ORDERED: that the motion to dismiss, or in the alternative, for summary judgment filed by Ervin and Associates and John Ervin (Dkt. 19 of Civil Action No. 99-1968) is DENIED without prejudice, and it is further

ORDERED: that a status conference to determine further scheduling of this matter is scheduled for Thursday, February 15, 2001 at 10:00 a.m. in Courtroom 3


UNITED STATES DISTRICT JUDGE