

Northern District of Texas Refuses to Enforce Purported Pre-Filing Qui Tam Claim Release on Public Policy Grounds

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by Scott Mah

On April 30, 2021, a Northern District of Texas judge denied a motion to dismiss an FCA *qui tam* action alleging “a fraudulent scheme to obtain Government subcontracting opportunities reserved for eligible small businesses under the Small Business Act.” *United States ex rel. Haight v. RRSA (Commer. Div), LLC*, 3:16-CV-1975-S, 2021 U.S. Dist. LEXIS 82894, at *1-4 (N.D. Tex. Apr. 30, 2021).

In the complaint, the relator alleged that one or more of the defendants received several lucrative government construction subcontracts by falsely claiming small business eligibility. *Id.* at *4. According to the relator, Defendant RRSA Residential, a large, national roofing company, and its related entities “devised a scheme to obtain subcontracting opportunities that are reserved for small businesses under the Small Business Act.” *United States ex rel Haight v. RRSA (Commer. Div.)*, 3:16-CV-1975-S, 2020 U.S. Dist. LEXIS 195267, at *4-5 (N.D. Tex. Oct. 20, 2020) (hereinafter “*Haight I*”). Certain government contracts are reserved, or set aside, for business that qualify as “small” under the SBA size standards set forth in 13 CFR 121. The relator alleged that RRSA Defendants falsely certified that an affiliated entity, RRSA Commercial, was an eligible small business, and calculated that it would have an advantage over legitimate small businesses due to the “combined resources, materials, industry connections, and ‘bondability’ that most legitimate small businesses do not have.” *Id.* at *6. After certifying that RRSA Commercial was an eligible small business on the System for Award Management (“SAM”) database, RRSA Commercial received “dozens” of small business subcontracts. *Id.* at *7. The relator also alleged that prime contractor defendants were aware that RRSA Commercial was in reality a large business and variously participated in and enabled the scheme. *Id.* at *7-8. Accordingly, the relator alleged that these false representations caused false claims for payment to be submitted to the government under an implied false certification theory. *United States ex rel. Haight v. RRSA (Commer. Div), LLC*, 3:16-CV-1975-S, 2021 U.S. Dist. LEXIS 82894, at *4 (hereinafter “*Haight II*”).

Defendants moved to dismiss, arguing that the relator failed to satisfy the pleading

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standards of Federal Rule of Civil Procedure Rules 8(a), 12(b)(6), and 9(b). *Haight I*, 2020 U.S. Dist. LEXIS 195267, at *11. The court granted the motion in part and denied the motion in part, granting the relator an opportunity to replead dismissed claims. *Id.* at *24.

Plaintiff filed an amended complaint in 2020. Dkt. 104. Defendants again moved to dismiss, this time arguing the relator lacked standing under Federal Rule of Civil Procedure 12(b)(1) because she had allegedly signed a settlement agreement that contained a broad release provision of “any and all claims” prior to the filing of the present *qui tam* action. *Haight II*, 2021 U.S. Dist. LEXIS 82894, at *5-6 (internal quotation omitted).

The court rejected Defendants’ standing argument and denied the motion to dismiss. In discussing Defendants’ standing argument, the court first noted the plain language of the FCA provides that “a *qui tam* relator may not unilaterally enter into an enforceable settlement agreement or release after filing an FCA action.” *Id.* at *11. Although the Fifth Circuit has not directly considered enforceability of pre-filing releases, the court noted that several circuits apply the balancing test articulated by the Ninth Circuit in *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 956 (9th Cir. 1995) when assessing enforceability. *Id.* at *11-17. Under the balancing test, courts must determine “whether the interest in enforcing the release was outweighed in the circumstances by a public policy harmed by enforcing the release.” *Id.* at *12 (citing *Green*, 59 F.3d at 958, 962).

Applying the balancing test to the facts alleged, the court found dispositive the factor that the government did not know of the alleged fraud at the time of the alleged signing of the release. Because *qui tam* suits serve a valuable role in notifying the government of instances of fraud and a contrary holding would incentivize defendants to settle cases of fraud pre-filing without ever informing the government, the court refused to enforce the release as “contrary to well-established public policy.” See *id.* at *13, 17. The court noted the case’s similarity to *Green*, where the Ninth Circuit likewise “concluded that enforcement of the pre-filing release would ‘impair a substantial public interest’ because the release ‘would threaten to nullify’ the ‘central purpose of the *qui tam* provisions of the FCA’—to incentivize insiders privy to fraud on the Government to ‘blow the whistle on crime.’” *Id.* at *12-13 (quoting *Green*, 59 F.3d at 963).

The case serves as a reminder of the underlying policy justifications for the *qui tam* provision of the FCA, and, moreover, as a cautionary tale of the skepticism that courts will apply to pre-filing releases.