FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
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KATINA WATSON
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Alyssa Garza

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

STATE OF NEW MEXICO ex. rel. KENNETH STALTER,
Qui Tam Plaintiff,
vs. **D-202-CV-2022-02544**

NCO FINANCIAL SYSTEMS INC. D/B/A TRANSWORLD SYSTMS, INC., et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on *Defendant Continental Service Group, Inc. d/b/a Conserve's Notice of Motion to Dismiss the Amended Complaint* and the memorandum of law in support thereof, both filed November 20, 2023; *Windham Professionals, Inc.'s, Williams & Fudge, Inc.'s, and Todd, Bremer & Lawson, Inc.'s Motion to Dismiss Amended Complaint*, filed November 20, 2023; and the *Motion to Dismiss* filed November 28, 2023 by Transworld Systems, Inc., Alltran Education, Inc., and EOS USA, Inc. Having considered the briefs and the arguments of counsel at a hearing on March 18, 2024, the Court **GRANTS** the motions.

I. FACTS AND BACKGROUND

The *First Amended Complaint for Violations of the New Mexico Fraud Against Taxpayers Act* (FAC) alleges that Defendants, which are collections agencies, contract with various state entities to collect educational and medical debt. [FAC ¶ 2] The FAC further alleges that Defendants, though they are licensed debt collectors, do not comply with licensing laws. [FAC ¶ 2] One way in which Defendants allegedly do not comply with licensing laws is by failing to have an adequate number of managers for the physical locations they claim to operate. [FAC ¶ 3] Another alleged licensing violation is listing private residences as registered offices. [FAC ¶ 4] Plaintiff alleges these actions constitute violations of the Collection Agency Regulatory Act, NMSA 1978, Sections 61-18A-1 through -33 (2019, as amended through 2022) (CARA). Based on these allegations, the FAC asserts a single count for violation of the Fraud Against Taxpayers Act (FATA).

The FAC also alleges that qui tam Plaintiff Kenneth Stalter is a former employee of the New Mexico Attorney General's Office. According to the FAC, qui tam Plaintiff has not been a state employee since June 2018. He learned of the alleged fraud in 2021. [FAC ¶¶ 14–17]

Defendants move to dismiss pursuant to Rule 1-012(B)(1) and Rule 1-012(B)(6). They argue: (1) the Court does not have jurisdiction because qui tam Plaintiff failed to exhaust internal procedures for reporting fraud during his employment with the State; and (2) the FAC does not state a claim for violation of FATA.

II. LEGAL STANDARDS

"Dismissals under Rule 1-012(B)(6) are proper when the claim asserted is legally deficient." *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. When considering motions to dismiss based on a failure to state a claim under Rule 1-012(B)(6), the Court "accept[s] all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint." *Id.* "A Rule 12(b)(6) motion is *only* proper when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Envtl. Imp. Div. v. Aguayo*, 1983-NMSC-027, ¶ 10, 99 N.M. 497, 660 P.2d 587 (emphasis in original).

III. DISCUSSION

A. The exhaustion requirement of Section 44-9-9(A) does not apply to qui tam Plaintiff.

The motions present a threshold issue: whether qui tam Plaintiff is subject to the exhaustion requirement contained in NMSA 1978, § 44-9-9(A) (2015). The Court concludes he is not.

FATA is a remedial statute designed to "compensate[] the State for losses incurred as a result of fraud and encourage[] qui tam plaintiffs to bring civil actions to root out fraud." *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2015-NMSC-025, ¶ 31, 355 P.3d 1. "A person may bring a civil action for a violation of [FATA] on behalf of the person and the state or political subdivision." NMSA 1978, § 44-9-5(A) (2015). If the person bringing the lawsuit is a current or former employee of the state or political subdivision, they must satisfy an exhaustion requirement prior to filing suit:

> No court shall have jurisdiction over an action brought pursuant to Section 44-9-5 NMSA 1978 by a present or former employee of the state or political subdivision unless the employee, during employment with the state or political subdivision and in good faith, exhausted existing internal procedures for reporting false claims and the state or political subdivision failed to act on the information provided within a reasonable period of time.

Section 44-9-9(A). For purposes of these motions, it is undisputed that qui tam Plaintiff is (1) a former employee of the state and (2) did not exhaust internal procedures for reporting false claims before filing suit.

Defendants argue Section 44-9-9(A) bars this lawsuit because qui tam Plaintiff did not exhaust internal remedies before he left state employment. Defendants acknowledge the allegation that qui tam Plaintiff did not discover the alleged fraud until approximately three years after his employment ended. They argue the exhaustion requirement applies nevertheless. According to Defendants, all alleged FATA violations must be exhausted during the period of state employment—regardless when the violation is discovered—or suit is barred.

Qui tam Plaintiff responds that he could not comply with the exhaustion requirement because internal procedures for reporting fraud were no longer available to him after he left state employment. Qui tam Plaintiff argues the Legislature could not have intended to bar suit by former state employees who discover fraud after their employment ends.

This matter raises an issue of statutory construction. The guiding principle of statutory construction is "to determine and give effect to legislative intent." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d 1047 (quotation marks and citations omitted). The plain language is the primary indicator of legislative intent. *Id.* However, the Court is not bound by formalistic or mechanical statutory construction when the result of doing so would be absurd, unreasonable, or contrary the spirit of the statute. *Gandydancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 14, 453 P.3d 434.

The Court concludes the exhaustion requirement at Section 44-9-9(A) does not apply to the facts alleged in the FAC. Section 44-9-9(A) expressly requires claims to be exhausted "during employment." A former state employee who learned of fraud during employment must have exhausted internal reporting procedures while still employed, *i.e.*, "during employment." A former state employee who does not learn of fraud until after employment ends is unable to exhaust internal procedures "during employment." In other words, a claim can only be exhausted "during employment" if it is discovered during the employment. A FATA violation that is not discovered until after employment ends cannot be reported "during employment."

Defendants argue that qui tam Plaintiff is seeking an exemption from the exhaustion requirement. They claim FATA contains no language limiting the exhaustion requirement to claims discovered during employment.

The construction Defendants propose is not consistent with either the plain language or the spirit of FATA. FATA is a statute intended to facilitate maximum recovery of funds obtained from the state by fraudulent means, as reflected in its qui tam provisions and attorney fee incentives. NMSA 1978, §§ 44-9-7, 44-9-8 (2015). Defendants' proposed construction would bar state employees from bringing FATA lawsuits if fraud is discovered after state employment ends.

The Legislature could not have intended this result given that the purpose of the statute is to encourage civil actions to root out fraud.

B. The First Amended Complaint fails to state a claim upon which relief can be granted.

The claims in this lawsuit are based on Defendants' alleged failure to comply with CARA's licensing requirements. [FAC ¶¶ 1, 3–9, 33] From responses he received to his public records requests, qui tam Plaintiff allegedly learned that Defendants charged various state entities millions of dollars for debt collection services even though Defendants are not fulfilling licensing requirements. [FAC ¶¶ 3, 45–48] At the hearing on this motion, qui tam Plaintiff argued that though Defendants possess licenses, the licenses should not have been issued because they were based on misrepresentations made to the licensing entity, or in the case of Defendant NCO, material omissions.

The Court concludes that these allegations, taken as true, do not state a claim for violation of FATA. FATA lists nine prohibited actions, all of which require attempting to obtain payment for a false or fraudulent claim or attempting to increase a payment obligation by fraudulent means. NMSA 1978, § 44-9-2(A) (2015) (defining "claim" as "a request or demand for money, property or services when all or a portion of the money, property or services requested or demanded issues from is provided or reimbursed by the state or a political subdivision"); NMSA 1978, § 44-9-3(A) (2015) (listing nine prohibited actions).

Qui tam Plaintiff does not allege Defendants charged the state for services that were not provided, fraudulently inflated their invoices, delivered false receipts, or that they otherwise attempted to obtain payments or avoid payment obligations by fraudulent means. Rather, qui tam Plaintiff alleges Defendants should not have been licensed. Even if Defendants obtained their licenses based on misrepresentations as alleged, FATA does not provide a remedy for improper licensing. Accordingly, the FAC does not state a claim for violations of FATA and the motions therefore must be granted.

IV. CONCLUSION

Defendants' Motions are **GRANTED.**

IT IS SO ORDERED.

The Honorable Denise Barela Shepherd
District Court Judge

This is to certify that a true and correct copy of the foregoing document was e-filed on July 16, 2024

Danielle O. DeMatty, TCAA to:
The Honorable Denise Barela-Shepherd
District Court Judge

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