IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel.* ALBERT C. HANNA,	)	
Plaintiff,	)	No. 11-cv-04885
v.	)	Judge Andrea R. Wood
CITY OF CHICAGO,	)	
Defendant.	)	

ORDER

Defendant's motion to dismiss [25] is granted. Relator is granted leave to file an amended complaint that remedies the pleading deficiencies in the original complaint by 10/22/2014. See the accompanying Statement for details.

STATEMENT

Relator Albert Hanna has brought this *qui tam* action on behalf of the United States under the False Claims Act, 42 U.S.C. § 3729 *et seq*. The False Claims Act "permits both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the United States." *U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, --- F.3d ---**,** 2014 WL 3704023, at *2 (7th Cir. July 28, 2014) (quoting *Graham Cnty. Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 283 (2010)).

In this case, Hanna alleges that Defendant City of Chicago (the "City") received funds from the United States Department of Housing and Urban Development. As a condition of receiving those funds, the City was required to certify its compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Fair Housing Act, 42 U.S.C. §§ 3608(e)(5), 5304(b)(2), and 12705(b)(15). These provisions and related federal regulations required the City not only to comply with prohibitions on discrimination in federal housing but also to take affirmative steps to further fair housing. Hanna claims that the City's certifications of compliance with these requirements were knowingly false, and thus he seeks to recover the federal funds received by the City during the six-year period prior to the filing of his complaint.

As a threshold matter, the City contends that Hanna's claim should be dismissed for lack of subject matter jurisdiction pursuant to Section 3730(e)(4) of the False Claims Act, 42 U.S.C. § 3730(e)(4). That provision, known as the public disclosure bar, "precludes suits 'based upon the public disclosure of allegations or transactions . . . 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 the

original source of the information.'" *Wisconsin Bell, Inc.*, 2014 WL 3704023, at *2 (citing Addendum 1, 31 U.S.C. § 3730(e)(4)(A)). If the public disclosure bar applies to a claim, then federal courts lack subject matter jurisdiction to hear it. *Id.* Determining whether the public disclosure bar applies requires a court to conduct a three-step inquiry. "First, it examines whether the relator's allegations have been 'publicly disclosed.' If so, it next asks whether the lawsuit is 'based upon' those publicly disclosed allegations. If it is, the court determines whether the relator is an 'original source' of the information upon which his lawsuit is based." *Id.*

In the present case, it is undisputed that the City's applications for federal funds and the locations of its public housing units are matters of public record, and Hanna does not contend that he offers any unique information or insight regarding the City's responsibility for continued residential segregation in Chicago. Instead, he alleges simply that the City "knowingly" administered various programs in a way that "perpetuated and exacerbated" segregation (Compl. ¶ 22, Dkt. No. 5), and that the City "knowingly" failed to adopt and implement programs to "undo" that segregation (*id.* ¶ 23).

Hanna does not identify the City employees or agents who he claims knowingly implemented programs in ways that increased segregation or declined to implement programs that would have reduced it. Nor does the complaint specify the programs that he claims had these effects. Focusing on the complaint's lack of specificity, the City contends that on the face of the pleadings, the Court "cannot determine if [Hanna's] allegations have been publicly disclosed" and "cannot know whether Hanna's claims have been the subject of public discussion." (Mem. in Supp. of Mot. to Dismiss at 7, 10, Dkt. No. 26.)

The burden of establishing proper federal subject matter jurisdiction rests on the party asserting it. *Kokkonen v. Guardian Life Ins., Co. of Am.*, 511 U.S. 375, 377 (1994); *Muscarello v. Ogle Cnty. Bd. of Comm'rs*, 610 F.3d 416, 425 (7th Cir. 2010). But while the City is correct that the burden of establishing jurisdiction rests with Hanna, it does not necessarily follow that the complaint's failure to allege facts disproving prior public disclosure requires its dismissal.

There is a difference between facial and factual challenges to jurisdiction. "Facial challenges require only that the court look to the complaint and see if the plaintiff has sufficiently *alleged* a basis of subject matter jurisdiction." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009) (emphasis in original). Here, Hanna's complaint makes out a facially sufficient claim of subject matter jurisdiction—*i.e.*, the existence of a federal question under the False Claims Act. (Compl. ¶¶ 8-10.)

The City does not challenge that basis for federal court jurisdiction. Rather, by invoking the public disclosure bar, the City attempts to establish an affirmative matter to defeat Hannah's claim of jurisdiction—*i.e.*, that Hanna's allegations have been publicly disclosed. This is a factual challenge to jurisdiction. "[A] factual challenge lies where the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction." *Apex Digital*, 572 F.3d at 444 (emphasis in original). A plaintiff need not anticipate or plead around such affirmative matter. *Peterson v. McGladrey & Pullen, LLP*, 676 F.3d 594, 600 (7th Cir. 2012). Instead, when a plaintiff has made a facially sufficient allegation of jurisdiction, his obligation to counter the defendant's assertion of a lack of jurisdiction arises "once a defendant proffers

evidence that calls the court's jurisdiction into question." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n,* 149 F.3d 679, 685 (7th Cir. 1998). At that point, the plaintiff must provide proof that jurisdiction exists. *Apex Digital,* 572 F.3d at 444-45.

Here, the City has not offered evidence that the fraud alleged by Hanna has been publicly disclosed. To the contrary, the City concedes that the complaint is not sufficiently detailed for it or this Court to make such a determination. Hanna's complaint is facially sufficient in its allegation of subject matter jurisdiction and no evidence of prior public disclosure has, as of yet, triggered an obligation for Hanna to attempt to negate an inference of a jurisdictional bar. If this case goes forward, the City may be able to adduce facts to show that Hanna's allegations were previously publicly disclosed. But at this stage in the litigation, the Court cannot find that Hanna's claim is barred by Section 3730(e)(4).

While Hanna's complaint may have survived the City's jurisdictional challenge—at least for the time being—it still must satisfy the pleading requirements for fraud claims. To establish civil liability under the False Claims Act, a relator must show that (1) the defendant made a statement in order to receive money from the government; (2) the statement was false; and (3) the defendant knew the statement was false. *U.S. ex rel. Yannacopoulos v. Gen. Dynamics,* 652 F.3d 818, 822 (7th Cir. 2011). In addition, Federal Rule of Civil Procedure 9(b) applies to False Claims Act claims and requires a complaint under the statute to "state with particularity" the circumstances constituting the alleged falsehood. *U.S. ex rel. Garst v. Lockheed-Martin Corp.,* 328 F.3d 374, 376 (7th Cir. 2003). A complaint does not satisfy the requirements of Rule 9(b) if it fails to allege how the representations at issue are fraudulent. *DiLeo v. Ernst & Young,* 901 F.2d 624, 627-28 (7th Cir. 1990). A False Claims Act relator must plead an adequate factual basis for his allegations that the defendant knowingly made false statements. *U.S. ex rel. Totten v. Bombardier Corp.,* 286 F.3d 542, 551-52 (D.C. Cir. 2002). A complaint that merely alleges the conclusion that a defendant knowingly provided a false certification, but does not allege facts to support that conclusion, fails to state a claim for relief. *U.S. ex rel. Pervez v. Beth Israel Med. Ctr.,* 736 F. Supp. 2d 804, 813-14 (S.D.N.Y. 2010).

As noted above, Hanna's complaint in this case alleges that the City "knowingly administered its zoning, land use, building code, funding, and affordable housing programs in a fashion that perpetuated and exacerbated racial and ethnic segregation." (Compl. ¶ 22.) It further asserts that the City is aware of such segregation but "has failed to administer its programs and failed to take the affirmative steps required to overcome the fair housing impediments experienced by African-Americans and Latinos on account of such segregation." (*Id.* ¶¶ 31-32.) The complaint does not, however, identify any specific zoning, land use, building code, funding, or housing program actions by the City that have exacerbated segregation; nor does it allege facts supporting a conclusion that any City employee or agent intended or was aware of any such impact. The complaint is similarly devoid of facts that would support its conclusion that the City made no attempt to identify or address fair housing impediments. Without such facts, Hanna's complaint lacks the specificity necessary to state a claim for relief under the False Claims Act. *Ebeid ex rel. U.S. v. Lungwitz,* 616 F.3d 993, 998 (9th Cir. 2010).

Accordingly, the City's motion to dismiss the complaint for failure to state a claim is granted. The complaint is dismissed without prejudice. Hanna is granted leave to file an amended

complaint that addresses the pleading deficiencies in the original complaint discussed above by October 22, 2014.

Dated: September 25, 2014

Andrea R. Wood
United States District Judge