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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 33,787

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
JUN 04 2015

STATE OF NEW MEXICO, ex rel. FRANK FOY,
SUZANNE FOY AND JOHN CASEY,

Appellants,

vs.

First Judicial District Cause
No. D101-cv-2011-01534

NEW MEXICO STATE INVESTMENT COUNCIL;
DANIEL WEINSTEIN; VICKY L. SCHIFF;
WILLIAM HOWELL; and MARVIN ROSEN,

Appellees.

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT,
THE HONORABLE SARAH SINGLETON

ANSWER BRIEF OF APPELLEE, WILLIAM HOWELL

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ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, the Answer Brief complies with the applicable type-volume limitation of Rule 12-213(F)(3) in that the body of the Brief contains 3,215 words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Word 2010.

INTRODUCTION

This appeal is taken by *Qui Tam* Intervenors from the District Court's approval of a settlement entered into between the Plaintiff, New Mexico State Investment Counsel (NMSIC) and Defendant, William Howell. The District Judge conducted a two-day evidentiary hearing as required by the Fraud Against Taxpayers Act (FATA) and entered factually supported and legally correct Findings of Fact and Conclusions of Law that the settlement is fair, adequate, and reasonable under the circumstances.

The *Qui Tam* Intervenors do not challenge the evidentiary support for any of the Judge's Findings of Fact, nor do they contend that the Judge committed legal error in any of the Conclusions of Law. Instead, *Qui Tam* Intervenors collaterally attack the District Judge's ruling, contending that they were not allowed to engage in discovery, that the NMSIC acted in violation of the Open Meetings Act in negotiating the settlement, and that the Judge's ruling improperly determined the separate *Austin* case filed by the *Qui Tam* Intervenors.

None of the arguments raised by the *Qui Tam* Intervenors have merit, nor do they provide any basis for reversal of the District Court's decision to approve the settlement. Instead, the District Judge's ruling is well-reasoned and supported by substantial evidence in the record and, therefore, should be affirmed.

SUMMARY OF PROCEEDINGS

This is an action brought by the NMSIC against several defendants under FATA and common law. Pursuant to authority granted by FATA, NMSIC negotiated settlements with some defendants, including William Howell. NMSIC then submitted the proposed settlements to the District Court for approval and, as mandated by FATA, the Court gave notice, an opportunity for *Qui Tam* Intervenors to object to the proposed settlements, and held a two-day evidentiary hearing. Mr. Howell presented the following testimony, by Affidavits and in person, at the evidentiary hearing:

Mr. Howell is a resident of the State of New York who has never been a resident of or maintained an office, facility or employees in the State of New Mexico. [RP 742-743, ¶¶ 3 and 4]. During the relevant time period, Mr. Howell made his first and only trip to New Mexico. During that trip, he had dinner with Marc Correra on April 3, 2006. [RP 744, ¶ Paragraph 12]. Mr. Howell and Correra both assert that they transacted no business and specifically did not discuss the two New Mexico investments with which Mr. Howell was associated. [RP 744-745, ¶¶ 14 and 26].

Mr. Howell acted as a private equity consultant to InterMedia Advisors, LLC, its fund InterMedia VII, and GSC Recovery III, L.P., performing introduction and referral services for those clients. [RP 745-746, ¶¶ 15 and 19].

NMSIC made investments with InterMedia VII ("InterMedia") and GSC Recovery III ("GSC"). [RP 744, ¶ 14). The investments with Intermedia and GSC were made before the enactment of the New Mexico Fraud Against Taxpayers Act. [RP 5643, ¶ 22].

Mr. Howell never has been involved with any investment by the New Mexico Educational Retirement Board or any other New Mexico governmental entity. [RP 5268, ¶ 12]. Mr. Howell did not have any contact with any New Mexico government official while performing consulting services for InterMedia and GSC. He never had any contact with Gary Bland. [RP 745-746, ¶¶ 17, 21 and 27]. All of the services Mr. Howell performed for InterMedia and GSC were performed outside of the State of New Mexico. [RP 745-747, ¶¶ 17, 18, 21 and 23].

Mr. Howell received a fee of $150,000 from InterMedia in connection with NMSIC's investment. RP 5267, ¶ 6]. Mr. Howell's companies received a fee of $450,000 from GSC Group in connection with NMSIC's investment. [RP 5267, ¶ 8]. Of the $600,000 received, $50,000 was paid to Crosscore Management and $225,000 to SDN Advisors. [RP 5267-5268, ¶¶ 7, 9 and 10].

NMSIC served a response to the informal discovery request of Intervenors on November 15, 2013, showing the two investments with which Mr. Howell was

associated were profitable. No evidence to the contrary was presented by the Intervenors. [RP 5660, ¶¶ 67-69].

Mr. Howell asserts that he did nothing wrong in connection with NMSIC's investments. NMSIC and he agreed that the settlement agreement and the payment of the settlement funds of $125,000 should not be construed as an admission of wrongdoing or liability. [Howell Settlement Agreement, Plaintiff's Exhibit D, Whereas Clause 7, Paragraph 6].

Mr. Howell challenged the personal jurisdiction of the New Mexico courts by filing motions to dismiss in each case in which he was named. [RP 5651, ¶ 44; RP 5677, ¶ 33].. Mr. Howell on August 14, 2012 filed a Renewed Motion to Dismiss Third Amended Complaint for Money Damages for Lack of Personal Jurisdiction [RP 3232-3249].

Although Mr. Howell appeared and testified in person at the evidentiary hearing, *Qui Tam* Intervenors chose not to cross-examine Mr. Howell or to put on any evidence relating to their objection to the settlement. [RP 5660, ¶ 69; TR 11-25-2013, p. 171, line 11-p. 178, line 20]. Following the evidentiary hearing, the District Judge made extensive Findings of Fact based on the evidence presented at the hearing.

The Court's Findings of Fact relating to Mr. Howell were consistent with the Affidavit and live testimony presented at the evidentiary hearing, including

Findings Nos. 4, 18, 39, 41, 44, 48, 66, 67, and 69. *Qui Tam* Intervenors have not specifically challenged any of the trial Judge's Findings of Fact. Therefore, those unchallenged findings are binding on appeal. *Griffin v. Guadalupe Medical Center, Inc.,* 1997-NMCA-012, ¶ 4, 123 N.M. 60, 63, 933 P.2d 859.

ARGUMENT

The Fraud Against Taxpayers Act (FATA) provides that "the state may settle the action with the defendant notwithstanding any objection by the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate and reasonable under the circumstances." NMSA 1978, § 44-9-6(C)(2012). The District Court, on notice to all interested parties, including *Qui Tam* Intervenors, conducted the two-day evidentiary hearing required by FATA and, based on the substantial evidence properly admitted at the hearing, concluded that the settlements, including with Mr. Howell, are fair and reasonable. [RP 5671, ¶ 20-5682, ¶ 44]. The District Court's Findings of Fact and Conclusions of Law are supported by substantial evidence in the record, proper as a matter of law, and should be affirmed.

I. THE COURT'S FINDINGS AND CONCLUSIONS THAT THE SETTLEMENT IS FAIR AND REASONABLE ARE SUPPORTED BY THE RECORD AND LEGALLY CORRECT

A. The Court Properly Concluded that the Settlement is Fair and Reasonable in Light of the Risks in Establishing Both Liability and Damages.

The Court's Conclusions of Law relating to the settlement with Mr. Howell are properly based on the uncontested Findings of Fact and are legally correct. First, with respect to both the FATA and common law claims, both NMSIC and *Qui Tam* Intervenors would be required to satisfy the burden of establishing personal jurisdiction over Mr. Howell. Mr. Howell asserted arguments that he did not engage in any of the five acts enumerated in the long arm statute and that his contacts with the state were *de minimus,* and therefore insufficient for the courts to maintain jurisdiction over him. NMSA 1978 §38-1-16(A) (1971); *Santa Fe Technologies, Inc. v. Argus Networks, Inc.,* 2002-NMCA-030, 131 N.M. 772, 42 P.3d 1221; *State Farm Mutual Insurance Company v. Conyers,* 1989-NMSC-071, 109 N.M. 243, 245, 784 P.2d 986.

Qui Tam Intervenors did not counter Mr. Howell's facts in support of his position, and instead relied on the conclusory argument that he is somehow subject to the long arm jurisdiction of this Court. The District Court correctly concluded that the risk that Mr. Howell's motion to dismiss for lack of personal jurisdiction

might be granted and that risk supported the fairness and reasonableness of the settlement with Mr. Howell. [RP 5677, ¶ 33-5678, ¶ 34].

Second, as to the FATA claim of fraud and NMSIC's claims of unjust enrichment and aiding a breach of fiduciary duty, the evidence showed an additional risk of establishing liability. On the FATA claim, evidence must establish a knowing misrepresentation by Mr. Howell that was the proximate cause of damage to the State of New Mexico. There must be evidence beyond Mr. Howell's mere association with the funds in which NMSIC invested. He must have engaged in an action or made a statement either to improperly enrich himself or assist another to breach his fiduciary duty to NMSIC. See, *U.S. v. Greenberg,* 237 F. Supp. 439, 442 (SDNY, 1965) ("The conception of a claim against the government normally connotes a demand for money or for some transfer of public property". Quoting the Supreme Court, citation omitted).

Qui Tam Intervenors alleged that Mr. Howell participated in a wide ranging conspiracy to defraud the State in violation of a statute that can be applied retroactively. Both of the transactions with which Mr. Howell was associated, Intermedia and GSC, were completed and the funds invested before the enactment of FATA. Mr. Howell had no involvement with any investment by the Educational Retirement Board ("ERB"). There is no guarantee that FATA will be applied

retroactively, and if it is not so applied, the *Qui Tam* Intervenors will have no claim against Mr. Howell. [RP 5643, ¶ 22].

With respect to the *Qui Tam* Intervenors' conspiracy claim, it is axiomatic that for one to be held liable for the activities of a conspiracy, he must be aware of its existence and knowingly agree to participate. *Morris v. Dodge Country, Inc.*, 1973-NMCA-100, 85 N.M. 491, 492, 513 P.2d 1273, 1274. Accordingly, the *Qui Tam* Intervenors must produce evidence in support of those elements and thus far have failed to do so.

The District Court also concluded that this risk of being unable to establish liability against Mr. Howell and the other settling defendants favored approval of the settlements. [RP 5675, ¶ 28-5677, ¶ 32]. The District Court's conclusion that there is a substantial risk that liability would not be established against Mr. Howell is supported by the Findings of Fact and by sound legal reasoning.

Last, there is a substantial risk, as established by the record, that *Qui Tam* Intervenors and NMSIC would not be able to establish damages. In the absence of investment losses, the State was not damaged. *United States ex rel. Nudelman v. Int'l Rehabilitation Assocs., Inc.*, 2006 WL 925035, 2006 U.S. Dist. LEXIS 17958, at 54 (traditional measure of damages in a false claims act case is the difference between the market value of what the government was promised and what it actually received).

Further, the complexity of determining damages also mitigates in favor of a settlement. See, *Coleman v. Hernandez,* 490 F. Supp.2d 278 (D. Conn., 2007). Thus, even if Mr. Howell is held liable for a FATA violation or on one or more of plaintiff's claims, there is a risk that the prevailing party will not be able to establish damages.

The Court found and concluded that the risk of establishing damages mitigates in favor of the settlement due to the failure to establish any evidence that the NMSIC investments with which Mr. Howell was associated suffered any losses and the existence of evidence, which although provided to Intervenors was not used or ignored, that the investments were profitable. [RP 5678, ¶ 35-5681, ¶ 39]. The Court properly concluded that the risks of establishing damages mitigate in favor of the settlement of NMSIC's claims due to questions concerning whether Mr. Howell was unjustly enriched and/or assisted another in breaching a fiduciary duty to NMSIC, thereby causing damage to the State of New Mexico.

B. The Settlement is Reasonable in Light of the Best Possible Recovery and the Attendant Litigation Risks and Costs.

The settlement from Mr. Howell of $125,000 is reasonable when contrasted with a speculative and likely uncollectible recovery of three hundred million dollars under the Intervenors' theory and a maximum recovery of $325,000, the agreed upon amount Mr. Howell received in connection with the relevant

transactions. *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1389 (SDNY, 1972) ("Another factor to be considered here is the financial ability of all or any of the defendants to satisfy the maximum amount which the objectors contend will be theirs if the litigation goes to judgment. The prospect of a bankrupt judgment debtor at the end of the road does not satisfy anyone involved in the use of class action procedures".)

A recovery from Mr. Howell in the absence of a settlement would require litigating to judgment and then enforcement action in New York. On the other hand, New Mexico already is holding Mr. Howell's settlement payment. These factors favor the approval of the settlement as reasonable. The recovery of $125,000 is reasonable in light of the best possible recovery when weighed against the risks of litigation and establishing damages as enumerated in the above findings.

Both NMSIC and the Intervenors face risks if the settlement is not approved. The obstacles to establishing liability are several and uncertain; the potential is real that, having proven liability, damages as to Mr. Howell will be non-existent. Overcoming the obstacles and potential will be time consuming and extremely expensive. The record establishes and the District Judge properly concluded that the attendant risks of litigation mitigate in favor of this settlement. The interests of the State of New Mexico will be best served by settling with a minor defendant

such as Mr. Howell and focusing on the more culpable and significant defendants. [RP 5680, ¶ 39- 5682, ¶ 44].

II. THE QUI TAM INTERVENORS WERE PROVIDED ADEQUATE DISCOVERY

On appeal, *Qui Tam* Intervenors contend that the Court's decision approving the settlements should be reversed because they were not permitted to engage in discovery. However, prior to the evidentiary hearing, the Court permitted sufficient discovery to allow the *Qui Tam* Intervenors to assess the settlements and to prepare for cross-examination of witnesses at the evidentiary hearing.

The Court ordered that the parties would be allowed to engage in "early settlement" phase discovery. *Qui Tam* Intervenors then served overly broad and burdensome discovery requests that went beyond the scope of the discovery necessary for assessing the proposed settlement agreements. The Court ruled that the broader discovery would not be permitted, but allowed intervenors to obtain substantial discovery directed to the relevant issues involved in the settlement fairness hearing. [RP 5645, ¶ 29]. Pursuant to the Court's Order to allow discovery related to the settlements, prior to the hearing, the *Qui Tam* Intervenors were provided with millions of pages of documents and responses to discovery. [RP 5662, ¶ 72].

Also prior to the evidentiary hearing, the Court conducted a "preview" hearing in which *Qui Tam* Intervenors were advised as to the nature of the testimony that would be offered by witnesses, including Mr. Howell, at the evidentiary hearing, in order to permit the *Qui Tam* Intervenors to prepare for cross-examination at the evidentiary hearing. [TR 11-1-2013, p. 30, line 15-p. 32, line 17]. Counsel for the *Qui Tam* Intervenors were also served with all Affidavits of William Howell prior to the evidentiary hearing—all but one of the Affidavits had, in fact, been served on counsel for *Qui Tam* Intervenors more than a year prior to the evidentiary hearing. [See, e.g., RP 742-749].

Qui Tam Intervenors were provided with the opportunity to conduct discovery and notice of proposed testimony to permit them to cross-examine witnesses. *Qui Tam* Intervenors were also provided with millions of pages of documentary evidence sufficient to allow them to fully and fairly assess the fairness and reasonableness of the proposed settlements under the FATA criteria. The fact that *Qui Tam* Intervenors chose not to take the opportunities presented or use the evidence provided does not constitute reversible error by the Court.

III. NO VIOLATIONS OF THE OPEN MEETINGS ACT PRESENT ANY BASIS FOR REVERSAL OF THE COURT'S DECISION

Qui Tam Intervenors and *Amici Curiae* Foundation for Open Government and New Mexico Press Association also contend that the District Court's decision should be set aside because the settlement agreements were allegedly negotiated in

violation of the Open Meetings Act and quorum requirements for the SIC. However, these allegations are not material and do not support reversal of the Court's decision.

The District Court concluded that there were no procedural defects in the settlement process, including no violations of the Open Meetings Act. [RP 5663-5665]. These Conclusions of Law are supported by the evidence considered by the Court regarding the settlement process and the unchallenged Findings of Fact by the Court regarding that process. [RP 5647-5653].

Further, FATA requires that any settlement of claims under the Act be approved by the Court only after a full evidentiary hearing where *Qui Tam* parties are allowed to present their objections to the settlement. NMSA 1978, § 44-9-6(C)(2012). In this case, the District Judge expressly ruled that all proceedings relating to approval of the settlements would be conducted openly, with no confidentiality or secrecy. [TR 12-21-2012, p. 64, lines 8-15].

The proceedings to approve the settlements were conducted publicly, in open court, in full compliance with the requirements of FATA, and with no confidentiality or secrecy. Therefore, regardless of whether the allegations that the settlement process with Mr. Howell took place in violation of the Open Meetings Act or other quorum requirements, the bases for the settlement and terms of the settlement were fully disclosed and *Qui Tam* Intervenors were given the

opportunity to object and participate in the public proceedings for approval of the settlement. The Court's decision should not be reversed based on alleged violations of the Open Meetings Act or quorum requirements.

IV. THE DISTRICT COURT RESERVED RULING ON THE IMPACT OF THE SETTLEMENTS ON *AUSTIN* TO THE COURT IN THE *AUSTIN* CASE.

Qui Tam Intervenors also argue that the District Court's decision improperly released claims in the Austin case, and that Court's ruling should be set aside because the Court did not have jurisdiction over *Austin* and acted in violation of the stay of proceedings arising from the pending appeal in *Austin*. *Qui Tam* Intervenors' argument, however, is directly contrary to the actual rulings of the District Court.

The District Court fully considered *Qui Tam* Intervenors' contentions regarding the *Austin* case and the potential impact of the Court's rulings on *Austin*. The Judge entered express conclusions of law that it would be for the *Austin* Court to decide the question of the effect of the Court's rulings, if any, on the claims in *Austin*. [RP 5682, ¶ 45- 5684, ¶ 49].

Qui Tam Intervenors' argument regarding *Austin* does not accurately reflect the Court's rulings and does not afford a basis for reversal of the Court's decision. The District Court's ruling approving the settlement should be affirmed.

CONCLUSION

The District Court held an evidentiary hearing and concluded that SIC's settlement with William Howell is fair, adequate and reasonable under the circumstances, as required by FATA. NMSA 1978, § 44-9-6(C)(2012). The Court's Findings and Conclusions that the settlement is fair, adequate and reasonable are supported by substantial evidence in the record and unchallenged by the *Qui Tam* Intervenors. Therefore, the Court's determination should be affirmed.

THEREFORE, the Defendant-Appellee, William Howell, would respectfully request this Court affirm the District Court's Findings of Fact and Conclusions of Law and its Order of Dismissal of the claims against Mr. Howell.

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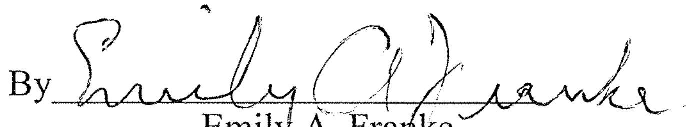
By 

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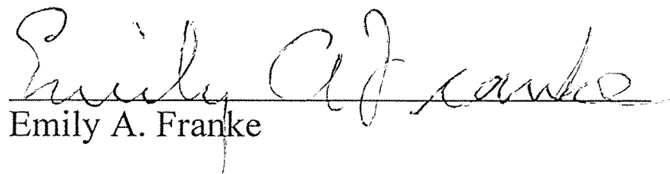

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