UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA and COMMONWEALTH OF MASSACHUSETTS, *ex rel.* LINA DACOSTA Plaintiffs, v. NEW COMMUNITIES SERVICES, INC. and NUESTRA COMMUNIDAD DEVELOPMENT CORPORATION Defendants.	)	Civil No. 18-10489-LTS

ORDER ON MOTIONS TO DISMISS (DOCS. NO. 22, 25)

March 8, 2019

SOROKIN, J.

Ms. DaCosta brought a qui tam case against New Communities Services, Inc. ("NCS") and Nuestra Communidad Development Corporation ("Nuestra") under the False Claims Act ("FCA") and its Massachusetts counterpart. After a period of time, the United States and the Commonwealth decided not to intervene in the action. Doc. No. 15. After the complaint was unsealed, the defendants moved to dismiss it. Docs. No. 22, 25.

I. FACTS[1]

NCS and Nuestra both operate adult day health programs and affordable housing programs in Massachusetts. Doc. No. 3 ¶¶ 2-3. Both entities contract with the United States and

[1] The Court recites all facts in accordance with the standard applicable to a motion to dismiss, accepting as true all well-pled facts in the complaint. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).

the Commonwealth to provide these services and are compensated through Medicare, Medicaid, and MassHealth. Id. ¶¶ 2-5. On October 17, 2017, Ms. DaCosta was hired by NCS "as a social services coordinator for residents and patients of NCS/Nuestra properties in Dorchester, Roxbury, and Cambridge, Massachusetts." Id. ¶ 6.

While employed with NCS, "Ms. DaCosta discovered that NCS had not performed care coordination assessments on many residents/patients since at least 2015 and potentially longer." Id. ¶ 8. She alleges that these assessments are required under agreements which NCS and Nuestra have with the United States and the Commonwealth. Id. Such assessments "ensure that [patients] receive the medical and social services they need, and only those services." Id. Ms. DaCosta alleges that "[d]espite not providing the required assessments, Nuestra and/or NCS billed the Commonwealth and/or the United States for these services." Id. ¶ 9. "Based on files she reviewed where assessments had not been done, Ms. DaCosta believes that assessments were not done, were done less often than required, for all NCS/Nuestra residents/patients for at minimum the last three years and potentially longer." Id. ¶ 11.

Upon discovering the assessments had not been done, Ms. DaCosta contacted management in both NCS and Nuestra "to discuss the problems." Id. ¶ 10. "NCS management instructed her to not pursue the matter further." Id. At some point thereafter, NCS changed Ms. DaCosta's status from a minimum 20 hour per week basis to an on-call basis. Id. "She has not been called for work since November 20, 2017, shortly after reporting that the assessments had not been done." Id.

II. LEGAL STANDARD

"FCA actions sound in fraud." United States ex rel. Nargol v. DePuy Orthopaedics, Inc., 865 F.3d 29, 37 (1st Cir. 2017). Accordingly, Rule 9(b) of the Federal Rules of Civil Procedure

requires the complaint to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). In qui tam cases alleging the submission of a false claim to the government, the First Circuit has held that "Rule 9(b) requires that a plaintiff's averments of fraud specify the time, place, and content of the alleged false or fraudulent representations." U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 226 (1st Cir. 2004).

III. DISCUSSION

Ms. DaCosta's complaint fails to state a claim under either False Claims Act or plead any such claim with particularity. While Ms. Acosta alleges that recurring assessments were not performed to determine what services patients needed, she does not allege that such unperformed assessments were billed to the United States or the Commonwealth, that either defendant billed for services not provided, or that either defendant billed for unnecessary services. In the paragraphs setting forth her actual FCA and Massachusetts counterpart claims, she does state "[b]y billing Medicare and Medicaid for services which they had not provided, NCS/Nuestra submitted false claims." Doc. No. 3 ¶ 12. However, nowhere in the complaint does Ms. DaCosta identify any such services which were not provided, the time and place they allegedly took place, or the content of the alleged false representations. In these circumstances, the Court is not required to credit such a conclusory unsupported assertion. Simply put, "evidence of an actual false claim is the *sine qua non* of a False Claims Act violation." Karvelas, 360 F.3d at 225. Ms. DaCosta has failed to plead both the making of any false claim and the particulars of any such claim as required by Rule 9(b). Accordingly, the motions to dismiss are ALLOWED as to Counts I and II.

Ms. DaCosta's failure to plead an actual false claim is also fatal to her retaliation claim. It is true that "proving a violation of [the FCA] is not an element of a [retaliation] cause of

action." Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409, 416 n.1 (2005). However, "in a suit alleging retaliation under the FCA, a plaintiff must sufficiently plead that he or she was retaliated against based on conduct that reasonably could lead to a viable FCA action." Guilfoile v. Shields, 913 F.3d 178, 188 (1st Cir. 2019) (internal quotation marks and citations omitted). Such conduct "encompasses an employee's investigations, inquiries, testimonies or other activities that concern the employer's knowing submission of false or fraudulent claims for payment to the government." Id. (internal quotation marks and citations omitted).

Ms. DaCosta has not pled that NCS or Nuestra submitted false or fraudulent claims to the government, even under a Rule 8 pleading standard. See Fed. R. Civ. P. 8 (requiring the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). Additionally, she alleges no details about what information she obtained, what was said in the conversations with NCS and Nuestra management, or even the precise timing of when she was changed to on-call status. This level of generality does not meet even the lower Rule 8 pleading standard. Accordingly, the motions to dismiss are ALLOWED as to Counts III and IV.

IV. CONCLUSION

The motions to dismiss, Docs. No. 22, 24, are ALLOWED. If Ms. DaCosta wishes to file an amended complaint, she may, within twenty-one days of this Order, file a motion for leave to do so. She shall attach to the motion for leave a proposed amended complaint and shall explain

within her motion papers the basis for concluding that the proposed amended complaint complies with the relevant pleading rules.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge