

In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 05-881C
(Filed September 1, 2006)

*
COMMERCE FUNDING CORP., *
*
Plaintiff, *
*
v. *
*
THE UNITED STATES, *
*
Defendant. *
*

MEMORANDUM OPINION AND ORDER

Before the Court is the government’s partial motion to dismiss the claims in the amended complaint which concern payments of invoices numbered twenty-one through twenty-three. The government argues that Commerce Funding Corp. has failed to state a claim concerning these payments, and thus seeks dismissal under RCFC 12(b)(6). In reviewing such a motion, the court must assume all well-pled allegations are true and draw all reasonable inferences in favor of the plaintiff. *See Ainslie v. United States*, 355 F.3d 1371, 1373 (Fed. Cir. 2004). The facts, as alleged, are as follows.

ICES, Ltd., was performing services for the Department of Health and Human Services’ Centers for Medicare and Medicaid Services (“CMS”), under a contract awarded on September 17, 2002. Am. Compl. ¶ 9. Pursuant to the Assignment of Claims Act, 31 U.S.C. § 3727 and 41 U.S.C. § 15, ICES assigned its right to the payments under this contract to Commerce Funding, which then served as a factor advancing payments to ICES. Am. Compl. ¶¶ 1, 11. The government received and acknowledged the notice of assignment in August, 2004, *id.* ¶¶ 12-13, and in accordance with the terms of the assignment paid Commerce Funding for the amounts due under invoices numbered sixteen through nineteen, from September through December, 2004. *Id.* ¶ 16.

Unbeknownst to plaintiff, in late December, 2004, ICES decided to terminate its business, but to continue to perform the CMS contract. Am. Compl. ¶ 25 and Ex. G. Commerce Funding continued to advance ICES the amount of payments receivable under the CMS contract. Early March, 2005, instead of paying plaintiff the amounts identified in invoice number twenty --

concerning services performed in December, 2004 -- the government paid the \$31,870.96 owed directly to ICES. *Id.* ¶ 17.

It appears that Commerce Funding's practice was to submit a "Government Certificate of Acceptance" to CMS, to receive a verified acknowledgment that the services detailed in an invoice were provided and accepted by the government, before plaintiff would advance the associated funds to ICES. *See* Am. Compl. ¶ 19 and Ex. D. Between January 31, 2005, and April 11, 2005, Commerce Funding received signed certificates of acceptance from the government concerning the services itemized in invoices numbered twenty-one through twenty-three. *Id.* Although payments relating to these three invoices were made to Commerce Funding in late April, 2005, defendant withheld 99% of the amount due. Am. Compl. ¶¶ 20-22. After receiving the first of these short payments, plaintiff contacted CMS and was told that the payments were reduced to offset debt allegedly owed the government by ICES. *Id.* ¶ 22. An employee of plaintiff contacted the president of ICES, who informed her that the company "went out of business on December 29, 2004" and had also "reached an accommodation with" the Small Business Administration concerning a debt owed the latter. *Id.* ¶ 25.

Plaintiff seeks payment of the amount paid to ICES for invoice number twenty and the amounts withheld relating to invoices numbered twenty-one through twenty-three. Concerning the latter, its theories of recovery include an unjust enrichment claim and the assertion of an equitable lien over the amounts withheld. Plaintiff contends that the government knew of ICES's plight and calculated that the SBA could only collect on ICES's debts if Commerce Funding kept ICES afloat to perform the CMS contract, generating payments that could be seized through the offset program. *See* Am. Compl. ¶¶ 1, 3, 23, 25-26.

The government has moved to dismiss the portion of the complaint concerning the amounts withheld relating to invoices twenty-one through twenty-three. It argues that plaintiff has failed to state a claim upon which relief can be granted, because the government is authorized to offset assigned payments to recover debts owed to the government by the assignor under 31 C.F.R. § 285.5(e)(6)(ii). Def.'s Mot. at 4. Defendant also argues that this regulation defeats plaintiff's claim of a superior equitable interest in the withheld monies and plaintiff's claim for unjust enrichment.

Plaintiff, for its part, argues that the applicability of 31 C.F.R. § 285.5 is an affirmative defense that cannot be proven from the face of the complaint and thus requires the consideration of matters outside of the pleadings. Commerce Funding is correct on this point. The complaint does not establish that there was a legitimate debt between ICES and defendant. It does not show the amount of this debt, or when the debt was incurred. Such a debt, if it existed, might allow an offset against the assigned payments, but defendant must first establish the elements satisfying the offset regulation. The amended complaint contains no allegations that concede or establish these elements, and it is the government's burden to prove them. *See Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1360-61 (Fed. Cir. 2005) (holding defendant has burden of proving affirmative defense).

Moreover, the allegations contained in the amended complaint appear to support the unjust enrichment and equitable lien theories. The allegations amount to the following: the government already knew that it intended to, in effect, seize the payments of the amounts owed under invoices twenty-one through twenty-three; the government also knew that Commerce Funding would advance the amounts of these invoices to ICES once the government verified that the services were accepted, and that plaintiff expected to be reimbursed for these invoices; and yet the government verified the acceptances, without saying one word about the imminent offsets, to induce Commerce Funding to continue to finance the performance of the CMS contract. This is a similar circumstance to that presented in *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104 (D.C. Cir. 1988), in which the D.C. Circuit explained the “means of protection” used by the SBA to collect a debt owed by a contractor in a “precarious financial condition”:

It could allow [claimant] to continue to supply fuel, enabling [the debtor contractor] fully to perform its duties under the 1980 contract, which in turn, would obligate [the other agency making payments under the contract] to enlarge the pool of funds.

Id. at 1115. Substitute the relevant actors involved in this case, and the service of supplying financing rather than fuel, and the D.C. Circuit’s determination of the presence of an unjust enrichment claim under “federal common law,” *id.* at 1113, 1117, also fits the allegations at hand.

It remains to be seen whether discovery will yield evidence of a plan, involving defendant, to continue performance of the CMS contract so that the factor’s payments could be converted into offsets; and the extent of any legal obligation of the government to disclose plans to offset has yet to be explored. But at this stage the allegations, and reasonable inferences drawn from them, suffice to state a claim for the withheld payments.

For the reasons stated above, defendant’s partial motion to dismiss is hereby DENIED. The defendant shall file an amended answer, addressing the allegations concerning invoices numbered twenty-one through twenty-three, on or by October 2, 2006.

IT IS SO ORDERED.

s/ Victor J. Wolski

VICTOR J. WOLSKI

Judge