

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7176

September Term, 2012

FILED ON: JANUARY 25, 2013

UNITED STATES OF AMERICA, EX REL. ROBERT KEITH BENDER,
APPELLANT

v.

NORTH AMERICAN TELECOMMUNICATIONS INC., (NATI), ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cv-01432)

Before: SENTELLE, *Chief Judge*, TATEL, *Circuit Judge*, and RANDOLPH,
Senior Circuit Judge

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

Robert Bender brought this *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, alleging violations by seven defendants, including Bender's former employer, North American Telecommunications, Inc. The district court granted defendants' motions to dismiss all five counts under Federal Rule of Civil

Procedure 12(b)(6), on the grounds that the amended complaint failed to “state with particularity the circumstances constituting fraud or mistake.” FED. R. CIV. P. 9(b).

As the district court detailed in its analysis of each count of the amended complaint, Bender failed to allege specific false claims and instead relied on general statements of alleged practice. *United States ex rel. Bender v. N. Am. Telecomm., Inc.*, 750 F. Supp. 2d 1, 6–11 (D.D.C. 2010). He failed to allege the time, place, and content of particular false claims, whether those claims were actually submitted to the government, who precisely was involved in making those claims, and what was obtained as a result. *See United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981). The district court was right to conclude that Bender’s amended complaint did not satisfy Rule 9(b), and, with two clarifications discussed below, we affirm for the reasons stated in its opinion.

First, Bender attempted to plead on information and belief by alleging that he lacked access to documents he needed in order to meet the particularity standard of Rule 9(b). The law permits a *qui tam* relator, such as Bender, to proceed if he provides the factual basis for the charges leveled against the defendant and some factual basis for the claim that the defendant is in control of the information that the relator requires in order to plead with particularity. *Kowal v. MCI Commc’ns Co.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994); *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 646 (3d Cir. 1990). Bender alleged that “[e]xcept for those specific facts identified herein, all of the material facts and records pertaining to the false or fraudulent claims, statements and documents submitted to the Government lie within the possession of [North American Telecommunications, Inc.], [Capitol Technology Services, Inc.] and/or [PAE Government Services, Inc.], including the specific certifications, billings, statements and records submitted to the Government, and Relator is without access to those facts and records and must rely on information and belief.” The district court did not consider whether Bender’s allegation was sufficient to plead on information and belief, and instead simply applied Rule 9(b)’s particularity requirement. *Bender*, 750 F. Supp. 2d at 8. Though it was erroneous, the court’s omission was harmless because Bender’s vague allegation falls short of the requirements articulated in *Kowal*. Bender failed to specify which records or documents he believes contain relevant facts, what facts those might be, which defendant he believes has the documents, and the basis for any of these beliefs.

Second, Bender argued that the Fraud Enforcement and Recovery Act of 2009, which, in relevant part, reduced the standard of liability for “all claims under the False Claims Act” pending on or after June 7, 2008, applied to his case. Pub. L. No. 111-21, § 4(f)(1), 123 Stat. 1617, 1625. The district court disagreed, interpreting the term “claims” to include only pending requests for payment and not pending cases, such as Bender’s. *Bender*, 750 F. Supp. 2d at 5 n.3. As the parties conceded during oral argument, it appears that only those counts against PAE Government Services, Inc., the subcontractor for Capitol Technology Services, Inc., implicate the relevant provision of the 2009 Act. Those counts are deficient under Rule 9(b) regardless of which standard of liability applies. Because the district court’s interpretation of the term “claims” in the Act’s retroactivity clause is unnecessary to decide the case, we do not reach the question.

We also note that it was not an abuse of discretion for the district court to dismiss the complaint with prejudice in light of Bender’s failure to seek leave to amend. *See Kowal*, 16 F.3d at 1279–80.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk