United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5353 **September Term, 2017**

FILED ON: FEBRUARY 15, 2018

BANNUM, INC.,
APPELLANT

v.

CHARLES E. SAMUELS, JR., ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cv-01233)

Before: GARLAND, *Chief Judge*, PILLARD, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

Pursuant to this court's order granting appellant Bannum, Inc.'s motion to dispense with oral argument, this appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). 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 district court's decision be affirmed for the reasons set forth in the memorandum filed simultaneously herewith.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

MEMORANDUM

Charles Bannum, Inc. ("Bannum") contracts with the Bureau of Prisons ("BOP") to operate Residential Reentry Centers ("RRCs") for federal offenders. Although Bannum currently operates six such centers, it brought this action against seven current and former BOP employees for de facto debarment and interference with contractual relations, alleging that they had engaged in systematic efforts to bar Bannum from being awarded RRC contracts. The complaint sought relief by way of declaratory judgment, injunction, and damages in excess of $10 million.

Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), 28 U.S.C. § 2679, the district court granted the government's motion to substitute the United States as the sole defendant in the case. *Bannum, Inc. v. Samuels*, 221 F. Supp. 3d 74, 78 (D.D.C. 2016). The court then granted the government's motion to dismiss, holding (1) that it lacked subject matter jurisdiction because the government was immune from suit and (2) that Bannum failed to state a claim of de facto debarment. Bannum appealed.

Bannum first argues that the district court erred by granting the government's motion to substitute the United States for the individually-named defendants. Under the Westfall Act, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose" the lawsuit proceeds against the United States. 28 U.S.C. § 2679(d)(1). "The certification carries a rebuttable presumption that the employee has absolute immunity from the lawsuit and that the United States is to be substituted as the defendant." *Wilson v. Libby*, 535 F.3d 697, 711 (D.C.

Cir. 2008). To rebut the prima facie evidence that the defendants acted within the scope of their employment, the plaintiff must allege specific facts establishing that the defendants exceeded the scope of their employment. *Jacobs v. Vrobel*, 724 F.3d 217, 220 (D.C. Cir. 2013). We review the district court's legal conclusions regarding the sufficiency of Bannum's scope-of-employment allegations de novo. *Wuterich v. Murtha*, 562 F.3d 375, 383 (D.C. Cir. 2009).

In this case, the Attorney General certified that the individual defendants were acting within the scope of their employment, and Bannum consented to the substitution of the government with respect to the de facto debarment claim. However, with respect to the contractual interference claim, Bannum argues it made three specific allegations that the individual defendants exceeded the scope of their employment: (1) a Residential Reentry Manager stopped monitoring Bannum's contract to advocate against Bannum with a city; (2) the individual defendants' participation in the alleged debarment was outside the scope of their duties; and (3) the individual defendants improperly manipulated the Contractor Performance Assessment Reporting System.

The scope of employment inquiry "focuses on the underlying dispute or controversy, not on the nature of the tort, and is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006) (quoting *Weinberg v. Johnson*, 518 A.2d 985, 992 (D.C. 1986)). The proper focus of the inquiry is on the act "that allegedly gave rise to the tort, not the wrongful character of the act." *Jacobs*, 724 F.3d at 221. Bannum's own amended complaint admits that monitoring contracts, participating in debarment, and reporting contractor performance all fall within the duties of BOP staff. Bannum's allegations concern the

"wrongful" intent of the employees while performing their duties. So long as the employee had an "intention to perform [the conduct in question] as a part of or incident to a service on account of which he [was] employed," a further, tortious intent does not remove the conduct from the scope of employment. *Jacobs v. Vrobel*, 724 F.3d 217, 222 (D.C. Cir. 2013), quoting *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 428 (D.C. 2006). Therefore, we affirm the district court's decision to substitute the United States as the defendant under the Westfall Act.

Second, Bannum argues that the district court erred by holding sovereign immunity precludes subject matter jurisdiction. We review a grant of a motion to dismiss for lack of subject matter jurisdiction de novo. *Nix v. Billington,* 448 F.3d 411, 414 (D.C. Cir. 2006).

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80, waives the government's sovereign immunity with respect to certain tort claims. *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1252 (D.C. Cir. 2005). However, the FTCA's waiver of sovereign immunity does not apply to claims of "libel, slander . . . or interference with contract rights." § 2680(h). A plaintiff "may not substitute the name of a cause of action not included in section § 2680(h) for one that is included where the alleged breach of duties in the two claims is identical." *Kugel v. United States*, 947 F.2d 1504, 1506–07 (D.C. Cir. 1991) (citing *Art Metal–U.S.A., Inc. v. United States,* 753 F.2d 1151, 1154-55 (D.C.Cir.1985)).

Bannum alleges that BOP employees engaged in various actions to prevent Bannum from winning BOP contracts, such as defaming Bannum's contract performance history and sabotaging Bannum's ability to retain its business. The district court correctly held that these claims are causes of action based in libel, slander, and interference with a contract—none of which come within FTCA's waiver of sovereign immunity.

In the alternative, Bannum argues that its de facto debarment claim arises under the Administrative Procedure Act ("APA"), rendering inapplicable FTCA's exceptions. Under the APA, sovereign immunity is waived for parties "seeking relief other than money damages." 5 U.S.C. § 702. Bannum argues that the APA applies because it sought only equitable relief for the de facto debarment claim and its claim for money damages applied to the interference with contract claim only. However, the first amended complaint states that Bannum seeks "declaratory relief, permanent injunction, *and monetary* and other relief based on the de facto debarment." Further, Bannum's prayer for relief includes the request to "[a]ward damages in excess of $10,000,000," without qualifying that the request applies to the interference of a contract claim and not the de facto debarment claim. Therefore, we affirm the district court's holding that sovereign immunity bars subject matter jurisdiction over Bannum's claims of interference with contract and de facto debarment, to the extent Bannum seeks monetary damages.

Third, Bannum argues that the district court erred by holding that Bannum failed to state a claim for de facto debarment. We review de novo a grant of a motion to dismiss for failure to state a claim. *Hurd v. District of Columbia Gov't*, 864 F.3d 671, 678 (D.C. Cir. 2017). We have jurisdiction over this claim—as did the district court—to the extent Bannum seeks nonmonetary relief. *See* 5 U.S.C. § 702. De facto debarment amounts to a constitutional due process injury if the plaintiff can show that there is a "broad preclusion" preventing it from retaining or being awarded contracts. *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643-44 (D.C. Cir. 2003). However, a showing that the contractor has "won some and lost some" contracts does not establish such preclusion. *Id.* Bannum contends that the defamatory statements of the BOP

officials and the BOP's systematic actions are sufficient to demonstrate a constitutional deprivation. However, since 2009, when Bannum alleges the de facto debarment began, Bannum admits that it received discretionary renewals on six of its contracts and also won a contract for a new location, though that contract was ultimately lost following a protest by the incumbent. Additionally, Bannum also admits it was awarded new contracts in the period between 2000 and 2009 after some of the BOP employees allegedly made defamatory remarks about Bannum's performance as a contractor.

Bannum relies heavily on *Phillips v. Mabus*, 894 F. Supp. 2d 71, 82 (D.D.C. 2012), to support its argument that it need not show that "it had lost 100%" of its work to establish de facto debarment. Even if that case were binding precedent, Bannum's situation is distinct from that of *Phillips*, because some of Bannum's contracts were renewed, whereas in *Phillips*, the government withdrew support for existing contracts and made categorical statements that the contractor would not be awarded any future contracts. *See Phillips*, 894 F. Supp. 2d at 82. Because the government continued to renew Bannum's contracts and Bannum has not shown that it is barred from being awarded new contracts, Bannum fails to state a claim that it is "broadly precluded" from obtaining government contracts. Therefore, we also affirm the district court's conclusion that Bannum failed to state a claim for de facto debarment.

For the reasons set forth above, the judgment of the district court is affirmed.