

State of N.Y. ex rel. Walsh v Dayan
2022 NY Slip Op 31966(U)
June 27, 2022
Supreme Court, New York County
Docket Number: Index No. 101426/2014
Judge: James d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES D'AUGUSTE

PART 55

Justice

-----X

STATE OF NEW YORK, EX REL. JAMES WALSH

INDEX NO. 101426/2014

Plaintiff,

MOTION DATE 04/19/2021

- v -

MOTION SEQ. NO. 006

CHARLES DAYAN,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 133, 134, 141, 142, 146

were read on this motion to/for

DISMISSAL**Hon. James E. d'Auguste, J.S.C.**

In this qui tam action, after initially declining to intervene, the State of New York (“State”), through the Office of the Attorney General of the State of New York (“Attorney General” or “OAG”), moves for an order, pursuant to New York Finance Law (“Finance Law”) Section 190(5)(b)(i), dismissing the Complaint filed by plaintiff-relator James Walsh (“relator”) with prejudice to relator and without prejudice to the State. For the reasons stated herein, the motion is granted.

Factual and Procedural History

On December 3, 2014, relator filed his Complaint under the New York False Claims Act (“NYFCA”), located at Finance Law Section 187, *et seq.*, alleging that defendant Charles Dayan (“defendant”), a real estate developer, underpaid his New York state and local taxes in 2011 and 2012 by falsely claiming tax deferral benefits from certain “like-kind exchanges” of the sale of property under Section 1031 of the Internal Revenue Code to evade paying nearly \$10 million in

personal income taxes, despite knowing that said exchanges were invalid, in violation of Sections 189(1)(d) and (1)(g) of the NYFCA. *See generally* NYSCEF Doc. No. 17. On February 6, 2015, this Court issued an order sealing the file and permitted the Complaint to be filed under seal (“Seal Order”).

On or about February 24, 2015, relator served a copy of the Complaint on the OAG, and the Attorney General began investigating the allegations contained therein. As part of its investigation, the OAG issued investigatory subpoenas to defendant and two third parties, and the State received over 55,000 pages of responsive documents. On August 12, 2015, in furtherance of the efficiency and common interest in the Attorney General’s investigation of the allegations contained in the Complaint, the OAG and relator executed an Agreement Regarding Common Interest and Disclosure of Information (“Common Interest Agreement” or “Agreement”), pursuant to which the Attorney General disclosed certain confidential documents and information it obtained in response to its investigatory subpoenas (“OAG Disclosed Information”) to relator subject to specific terms and conditions that, *inter alia*, required relator to (i) “return OAG Disclosed Information to OAG within five days after OAG requests that such information be returned, time being of the essence;” and (ii) “obtain written consent from OAG . . . prior to giving any person or entity . . . access [to OAG Disclosed Information]” and relator would ensure that “such person or entity [receiving said information] shall, unless this requirement is waived in writing by the OAG, agree in writing to be bound by the terms of this Agreement.” NYSCEF Doc. No. 123, at 1, §§ C(1)-(3)(a), (b). The Attorney General then acted in accordance with the Agreement.

In 2018, relator engaged in misconduct that not only hindered the Attorney General’s investigation into relator’s allegations but required repeated time-consuming intervention by the

OAG to protect its investigation, legal claims, and integrity of the instant litigation. Relator's misconduct included (i) violations of this Court's Seal Order; (ii) violations of the Common Interest Agreement; (iii) continued ex parte submissions to this Court despite the issuance of an order dated January 9, 2019 that prohibited said conduct; and (iv) numerous communications with the Attorney General, despite repeated instructions to refrain from said communications.

Specifically, on or about August 27, 2018, relator violated this Court's Seal Order and the Common Interest Agreement by sending an e-mail to two non-parties wherein he disclosed the existence of the instant litigation and confidential OAG Disclosed Information without adhering to the conditions of the Agreement. *See* NYSCEF Doc. No. 124, 125. The Attorney General immediately took remedial action and, by letter dated August 29, 2018, notified this Court of the Seal Order violation, and sent letters to the non-parties to notify them of the confidential nature of the information disclosed by relator and requested them to destroy relator's communications.

By letter dated September 5, 2018 to relator's then-counsel, the Attorney General requested that relator return or destroy all OAG Disclosed Information within five days of its receipt, pursuant to the terms of the Common Interest Agreement, because relator's disclosures, which included representations about his position in the instant litigation to a judge in an unrelated action, were "significantly hampering the State's ability to investigate the allegations in the complaint" and were "creating additional, unnecessary work." NYSCEF Doc. No. 125, at 1-2. The Attorney General further warned "that the State will consider [relator's] disclosures, and any future unauthorized disclosures, . . . in making determinations about this action, including whether to . . . move to dismiss the action without prejudice to the State." *Id.* at 2. Nonetheless, despite multiple requests from the Attorney General, relator refused to return or destroy the requested OAG Disclosed Information in line with his duties and obligations under

the Agreement for five (5) months, forcing the Attorney General to file an application seeking a court order for its return. The Attorney General's application was granted by an order of this Court dated May 21, 2019, which directed relator to "return or destroy the OAG Disclosed Information . . . within five business days of the issuance of this Order" and "prohibited [relator] from further disclosure or use of the OAG Disclosed Information." NYSCEF Doc. No. 108, at 1. Relator purportedly complied with this Court's May 21, 2019 order and submitted an affidavit, dated May 22, 2019, attesting to his compliance. NYSCEF Doc. No. 115, ¶ 2.

Additionally, relator sent e-mails directly to Attorney General staff members (NYSCEF Doc. No. 126) and ex parte communications to this Court. On September 10, 2018 and September 18, 2018, respectively, relator sent 39 and 10 page letters to this Court without sending contemporaneous copies to the State. *See id.*¹ Relator also made ex parte submissions to this Court on or about December 17, 2018, December 22, 2018, and January 9, 2019, copies of which this Court provided to both the State and relator's counsel.

On January 9, 2019, this Court issued an order that directed the relator to "cease [from] making any further ex parte communications or submissions to the Court and, . . . should the relator continue to engage in this or similar improper behavior, the Court may . . . dismiss the action in its entirety." NYSCEF Doc. No. 105. Nonetheless, relator continued to send letters, dated January 22, 2019 and January 31, 2019, directly to this Court after the order was issued, copying both his counsel and the State. Additionally, on July 6, 2020, relator left a voicemail for this Court (NYSCEF Doc. No. 127), and, on August 14, 2020, relator submitted a 57 page letter to this Court.² Relator inexplicably engaged in this misconduct despite being represented by

¹ The State procured copies of relator's letters three days and six days after their respective submission to this Court.

² As noted by the Attorney General's moving papers, the 57 page submission appeared to set forth relator's purported theory of the case; revealed confidential information that relator was supposed have returned to the OAG;

seasoned litigators, which resulted in these attorneys withdrawing as counsel for relator in this litigation.

On August 20, 2020, the OAG wrote to the Court requesting dismissal of the qui tam action with prejudice as to the relator and without prejudice to the State. NYSCEF Doc. No. 96. On March 5, 2020, this Court issued an order provided for a briefing schedule for the Attorney General to file a motion seeking the relief requested in her correspondence so that the relator would have an opportunity to be heard regarding the application. NYSCEF Doc. No. 118. On April 19, 2021, the Attorney General filed the instant motion. NYSCEF Doc. No. 120. On March 9, 2022, this Court heard oral argument on the motion to dismiss. Additional briefing was directed on the issue.³ This decision and order follows.

Discussion

In qui tam actions, it is the State or “the Government [that] remains the real party in interest in any such action.” *Certain Underwriters at Lloyd’s London Subscribing to Policy No. QK0903325 v. Huron Consulting Group, Inc.*, 127 A.D.3d 663, 665 (1st Dep’t 2015) (citation and internal quotation marks omitted). As explained by the Second Circuit: “It is the government that has been injured by the presentation of such [false] claims; it is in the government’s name that the action must be brought; [and] it is the government’s injury that provides the measure for the damages.” *Id.* (citation and internal quotation marks omitted). “[T]he Supreme Court of the United States has determined that a relator in a qui tam suit is one as the ‘partial assignee’ of the [government], but it has observed that the injury, and therefore, the right to bring the claim belongs to the [government itself].” *Id.*

and privileged communications with his counsel, including attorney work product, various disagreements, and disclaimed the accuracy of the Complaint. NYSCEF Doc. No. 121, at 6.

³ Relator’s most recent counsel has recently withdrawn from representing him. NYSCEF Doc. No. 149.

Moreover, the Attorney General is both the constitutional and statutory legal officer for claims of the State. *See, e.g., State ex rel. Leibowitz v. Family Vision Care, LLC, People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 204 (1st Dep't 2008); *People v. Santa Cara Lumber Co.*, 126 A.D. 616, 617-19 (3d Dep't 1908); *McGee v. Korman*, 70 N.Y.2d 225, 231 (1987); *Kirby v. State*, 68 Misc. 626, 630-31 (Ct. Cl. 1910) (“The Constitution and the executive law . . . confer upon the Attorney General the power, and impose on him the duty and the obligation, to defend actions and proceedings in which the state is interested in order that the interests of the state may be protected.”); N.Y. Const., Art. V, § 4 (“The head of . . . the department of law[shall be] the attorney-general.”); *see id.*, Art. IV, § 3 (granting the Attorney General the power to “take care that the laws are faithfully executed” when read in conjunction with Art. V, § 4); N.Y. Exec. Law § 63 (setting forth the duties of the Attorney General). Consistent with the Attorney General’s constitutional powers, the NYFCA permits the State to seek dismissal of a qui tam action in Finance Law Section 190(5)(b)(i), which states the following, in relevant part: “The state may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the motion.” Because there does not appear to be any appellate precedent interpreting Finance Law Section 190(5)(b)(i), this Court turns to federal law to assist in interpreting this statute. *See State of New York ex rel. Seiden v. Utica First Ins. Co. (Seiden)*, 96 A.D.3d 67, 71 (1st Dep't 2012). Federal case law has embraced two slightly different standards as relating to the government’s right to dismiss a qui tam action over a relator’s objection.

In *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), the D.C. Circuit gives the government broad latitude to dismiss a qui tam action. Essentially, that “the government [has]

an unfettered right to dismiss an[y qui tam] action” with the added “presumption that decisions not to prosecute . . . are unreviewable” by the judiciary. 318 F.3d at 252. *Swift* states that “[t]he decision whether to bring an action on behalf of the [government] is . . . ‘a decision generally committed to [the government’s] absolute discretion.’” *Id.* at 253 (third alteration in original) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). Similarly, “[t]he government’s discretion to dismiss an action it has already brought may not be absolute, but even then courts presume the [government] is acting rationally and in good faith” and there is nothing in the comparable federal statute to deprive the federal government of “its historical prerogative to decide which cases should go forward” in its name. *Id.* In *Swift*, the court suggested, but did not decide, that the only exception for a judicial hearing potentially exists where a “fraud on the court” may have been perpetrated. *Id.* Thus, the *Swift* court concluded “that the function of a hearing when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case.” *Id.*

In *United States ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp. (Sequoia)*, 151 F.3d 1139 (9th Cir. 1998), as a matter of statutory interpretation which was reviewed *de novo* (151 F.3d at 1143), the Ninth Circuit adopted the following two-step rational relation test to determine whether dismissal is warranted: ““(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose”” (*id.* at 1145 (quoting *U.S. ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341 (E.D. Ca. 1995)). Based upon the standard enunciated in *Sequoia*, a court first analyzes whether any “evidence [was presented] that the defendant[] engaged in bribery, fraud, or coercion, or otherwise conspired with the government to dismiss the qui tam action[] for improper reasons” (*Sequoia*, 151 F.3d at 1146), or, in other words, that the relator “failed to

establish that the government's prosecutorial judgment was arbitrary and capricious, illegal, or fraudulent" (*Swift*, 318 F.3d at 254). Second, a court evaluates the financial burden of litigating a particular claim: "the government can legitimately consider the burden imposed on the taxpayers by its litigation, and that, even if the relator [] were to litigate the FCA claims, the government would continue to incur enormous internal staff costs." *Sequoia*, 151 F.3d at 1146. *Sequoia* concluded that the government could "dismiss a meritorious qui tam action over a relator's objections [w]here . . . the government offers reasons for dismissal that are rationally related to a legitimate government interest." *Id.* at 1147. Thus, *Sequoia* notes that "[i]t is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government." *Id.* at 1144 (alteration in original) (quoting *Kelly*, 9 F.3d at 753 n.11).

As an initial matter, this Court notes that both standards are tremendously deferential to the government's decision to dismiss qui tam actions that are brought in the name of the State. Next, this Court concludes that the *Swift* standard is the appropriate standard to apply. As it is the Attorney General's constitutional responsibility to decide which claims to prosecute for the State, she should have the unfettered right to prosecute or dismiss qui tam actions with absolute discretion. *See Swift*, 318 F.3d at 252-53. At issue in qui tam actions are State claims and, as such, it is the Attorney General's decision, on behalf of the State, to prosecute or dismiss such actions with "the absence of judicial constraint" (*id.* at 252), not a relator's decision (*see id.* at 254 n.*). Consistent with that analysis, a relator, as here, is only entitled to notice of dismissal of the action, not a formal hearing tantamount to judicial review, except, potentially, in instances where a "fraud on the court" is being perpetrated, but no such evidence was presented by relator in the instant litigation. *See id.* at 253. As noted in *Swift*, the purpose of a hearing, in the absence of fraud, is only to convince the State not to dismiss the case, nothing more. *Id.*

Accordingly, no formal judicial hearing is required in this instance because there is no bad faith on behalf of the State, and, as such, nothing further is required to permit the State to dismiss this action. *See id.*

Even if *Sequoia* set the proper standard to evaluate the State's motion to dismiss, the facts presented here easily satisfy that standard. In this instance, the government has two valid purposes for dismissal that contain a rational relation between dismissal and the accomplishment of that purpose. The first government interest is that ending relator's involvement with this case will conserve government resources that would otherwise be expended to counter his misconduct. Because "the government's goal of minimizing its expenses is a legitimate objective," as noted in *Swift*, this would satisfy the *Sequoia* standard because "dismissal of the suit [would] further[] that objective." *Swift*, 318 F.3d at 254; *see Sequoia*, 151 F.3d at 1146; *see also, e.g., U.S. ex rel. Borzilleri v. AbbVie, Inc.*, No. 15-CV-7881 (JMF), 2019 WL 3203000, at *2 (S.D.N.Y. July 16, 2019) (holding that dismissal was warranted where the relator's continued litigation would "impose substantial burdens on government resources" and divert resources from other cases that the government viewed to be more meritorious); *U.S. ex rel. Amico v. Citigroup, Inc.*, No. 14-CV-4370 (CS), 2015 WL 13814187, at *4 (S.D.N.Y. Aug. 7, 2015) ("[A]voiding the monetary and human capital costs to the Government that Relators' litigation of this case would entail" justified dismissal). The government's second interest in dismissing this action is to ensure that relators pursue the State's legal claims in compliance with the rules of court and civil practice, which is rationally related to the Attorney General's duties and obligations of her office to ensure that laws are faithfully executed.⁴ Dismissal of this litigation

⁴ To satisfy the *Sequoia* standard, the government "need not produce evidence in support of its reasons for seeking dismissal but [it] only [needs] to provide 'plausible' or 'arguable' reasons supporting its decision." *City of N.Y. ex*

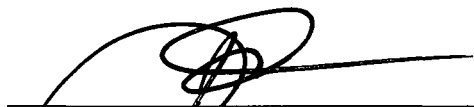
further this government purpose as relator has continually ignored this Court's orders to seal the court file in order to keep information confidential and to prohibit ex parte communications; relator has also breached the Common Interest Agreement and ignored requests to stop communicating directly with Attorney General counsel. Additionally, relator, in opposition to the instant motion, failed to establish that the government's "dismissal is fraudulent, arbitrary and capricious, or illegal" (*Sequoia*, 151 F.3d at 1145 (internal quotation marks and citation omitted)) or that the defendant in any way conspired with the government to dismiss the action (*id.* at 1146). Further, relator has also failed to present any colorable claim that dismissal is unreasonable in light of the existing evidence or that the government has not fully investigated the allegations. Here, the Attorney General thoroughly investigated the merits of the allegations in the Complaint over the span of approximately five years before deciding to dismiss the action. *See id.* at 1145. Accordingly, even if this Court were to apply the *Sequoia* standard, the State's motion to dismiss would still be granted because there is no aspect of fraud or second guessing the State's actions or intentions.

Finally, the Court requested supplemental briefing on the impact of the dismissal of this litigation with prejudice on the relator's potential entitlement to recover a share of any future recovery from defendant by the State should it be based upon the relator's claims in this litigation. The State, relator and defendant submitted correspondence documenting their respective positions. NYSCEF Doc. Nos. 141, 142, 146. Having considered these submissions, the Court finds the issue to be premature at this juncture.

rel. Lerman v. Siemens Ag, 2019 N.Y. Slip Op. 31947(U), 2019 WL 3006970, at *6 (Sup. Ct. N.Y. County July 10, 2019) (Madden, J.). Here, the State has provided significant evidence of wasted government resources.

Accordingly, the Attorney General's motion to dismiss the Complaint is granted and the action is dismissed with prejudice as to relator and without prejudice as to the State. The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

<u>6/27/2022</u> DATE			 JAMES D'AUGUSTE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> NON-FINAL DISPOSITION
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> GRANTED IN PART
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE