

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

<p>EARL A. POWELL, In the name of THE UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>AHEPA NATIONAL HOUSING CORPORATION; AHEPA MANAGEMENT CO.; and AHEPA 192-II, INC.,</p> <p>Defendants.</p>	<p>No. 4:05cv0008-JAJ</p> <p><b>ORDER</b></p>
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This matter comes before the court pursuant to the October 2, 2007 motion for partial summary judgment filed by defendant AHEPA Management Co. (“AHEPA”) (docket number 71). On October 2, 2007, defendants AHEPA National Housing Corporation and AHEPA 192-II, Inc. joined the partial summary judgment motion (docket number 73).<sup>1</sup> On October 15, 2007, the United States filed an *Amicus Curiae* brief in support of AHEPA’s motion for partial summary judgment (docket number 76).

**SUMMARY OF THE ARGUMENTS**

In its motion, AHEPA seeks dismissal of plaintiff’s False Claims Act claim, as well as his breach of contract claims. Specifically, AHEPA contends that plaintiff’s False Claims Act claims should be dismissed pursuant to Fed. R. Civ. P. 9(b) because he has failed to state with particularity the false claims submitted by the AHEPA entities to the government. Alternatively, AHEPA argues that plaintiff’s False Claims Act claims should be dismissed because he is forbidden from bringing the action as a *pro se* realtor. AHEPA

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<sup>1</sup>The court will collectively refer to the moving defendants as AHEPA.

argues that it is entitled to summary judgment on plaintiff's breach of contract claims because there is no consideration supporting the contractual provisions allegedly breached.

On October 19, 2007, this court ordered that the plaintiff file any response to defendants' motion for partial summary judgment by October 29, 2007. On October 29, 2007, the plaintiff filed a response to the September 24, 2007 order of this court granting plaintiff's most recent attorneys leave to withdraw and denying plaintiff's request for appointment of substitute counsel. Plaintiff's response speaks very generally to the substance of False Claims Act claims. Otherwise, plaintiff filed not resistance to defendants' motion for partial summary judgment. Plaintiff states:

My investigations have revealed that the primary cause of housing discrimination in the HUD Supportive Housing for the Elderly Program is the failure of Owner Landlords to design/build/provide handicap parking and access routes that meet UFAS accessibility standards. This failure also results in such projects being in violation of the False Claims Act.

In response to those complaints [filed by the plaintiff] twelve HUD officials wrote me letters containing fraudulent statements that were for the purpose of misleading me about who had the responsibility to enforce the FMAAct or to convince me that my complaints did not qualify for processing.

See Docket Number 78.

#### **SUMMARY JUDGMENT STANDARD**

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary

judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact.” Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although “direct proof is not required to create a jury question, . . . to avoid summary judgment, ‘the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.’” Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id.

### **CONCLUSIONS OF LAW** **False Claims Act**

The Eighth Circuit Court of Appeals discussed extensively the particularity necessary for a False Claims Act claim to satisfy Fed. R. Civ. P. 9(b).

Because the FCA is an anti-fraud statute, complaints alleging violations of the FCA must comply with Rule 9(b). Under Rule 9(b), “the circumstances constituting fraud . . . shall be stated with particularity.” Rule 9(b)’s “particularity requirement demands a higher degree of notice than that required for other claims,” and “is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations.” To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place, and content of the defendant’s false representations, as well as the details of the defendant’s fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result. Put another way, the complaint must identify the “who, what, where, when, and how” of the alleged fraud.”

Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556 (8<sup>th</sup> Cir. 2006) (internal citations omitted).

The court has reviewed plaintiff's amended complaint and jury demand (docket number 33). Plaintiff makes the following allegations in support of his False Claims Act claim against AHEPA.

28. Plaintiff complained to Defendant AHEPA 192-II, AHEPA Management Company and each of the HUD Defendants regarding violations of various Federal and state laws including, but not limited to, the Americans with Disabilities Act, the Fair Housing Act, the Rehabilitation Act, and Iowa Code and Iowa Administrative Regulations pertaining to persons with disabilities based on Defendants AHEPA 192-II's and AHEPA National Management Company's"
  - a. failure to provide adequate parking spaces for individuals with disabilities;
  - b. failure to provide access to the building over the shortest and safest possible route;
  - c. improper ramp slopes;
  - d. improperly functioning egress windows;
  - e. discrimination against persons with disabilities; and
  - f. Assertions to the Federal government that it was in compliance with all local, state and federal laws, when it had knowledge that it was not in compliance with such laws.
30. For more than two years, Plaintiff's complaints were either investigated by obtaining information only from those Plaintiff accused of violating his and other residents' rights, or dismissed summarily without any investigation whatsoever. Plaintiff was shuffled from office to office across various agencies and departments of all three branches of State and Federal governments without ever being afforded a hearing on the merits. When Plaintiff's complaints were dismissed, he was never informed of any appeal rights associated with the dismissals.
31. Defendants AHEPA National Housing Corporation, AHEPA Management Company, and AHEPA 192-II have collected millions of dollars in construction grants and rent subsidies while failing to comply with laws and regulations designed to provide accessible housing to the target population, i.e., elderly individuals and individuals with disabilities.
48. Pursuant to its Project Rental Assistance Contract with the United States government, Defendant AHEPA Management Company certified that it was in compliance with all federal state and local laws, including all disability

laws. Defendant AHEPA National Housing Corporation certified to the United States that its projects were in compliance with all federal, state and local laws each and every time it acted as a sponsor of supportive housing for the elderly projects.

49. Defendants' statements were made to the United States government with knowledge that its facilities were not in compliance with all federal, state, and local laws.

Considering these statements in a light most favorable to the plaintiff, AHEPA's motion for summary judgment must be granted. After years of litigation and appointment of several fine lawyers, Plaintiff appears to be no closer to identifying allegedly false statements than when he started. Plaintiff's amended complaint, discovery responses, and his response to the motions for partial summary judgment do not identify the time, place, maker, or specific content of any allegedly false representations. Further, insufficient detail is provided as to AHEPA's allegedly fraudulent acts. "Rule 9(b) requires more than such conclusory and generalized allegations." *Id.* at 557. Plaintiff fares no better by alleging a systemic practice absent at least some representative examples of the alleged fraud. *Id.* AHEPA's motion for summary on plaintiff's False Claims Act claim is granted.

Alternatively, the court would grant AHEPA's motion for summary judgment on plaintiff's False Claims Act claim because he is a pro se litigant in this matter and pro se litigants cannot prosecute a qui tam action. *Lu v. Ou*, 368 F.3d 773, 775 (7<sup>th</sup> Cir. 2004) (citing *United States v. Onan*, 190 F.2s 1 (8<sup>th</sup> Cir. 1951)).

### **BREACH OF CONTRACT CLAIM**

In pleading his breach of contract claim, plaintiff alleged:

59. On or about October 26, 2000, Plaintiff entered into a 2020 PRAC Lease (the "Lease") with Defendant AHEPA 192-II.
60. In Paragraph 7 of the Lease, Defendant covenanted with Plaintiff not to "discriminate against the [Plaintiff] in the provision of services or in any other manner on the grounds of . . . handicap."
61. In Paragraph 15 of the Lease, Defendant AHEPA 192-II covenanted with Plaintiff "to comply with the requirement of all applicable Federal, State,

and local laws, including health, housing and building codes and to deliver and maintain the premises in safe, sanitary decent condition.”

62. Defendant breached Paragraphs 7 and 15 of the Lease in one or more of the following particulars:
- a. Failing to provide sufficient handicapped parking spaces for disabled residents of the Property;
  - b. Failing to provide access to the apartment units across the shortest access route possible;
  - c. Imposing a term or condition on Plaintiff that is not imposed on people without disabilities; and/or
  - d. Failing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations were necessary to afford Plaintiff equal opportunity to use and enjoy a dwelling.

AHEPA argues that summary judgment should enter on plaintiff’s breach of contract claims because a promise to comply with the law lacks consideration to form a binding contract. AHEPA was already bound to comply with the Fair Housing Act and other discrimination laws, whether or not it signed a lease with the plaintiff.

“A promise to do that which one is already obligated to do will not suffice as consideration.” Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 534 (Iowa Ct. App. 1983). The facts supporting plaintiff’s breach of contract claims mirror those in support of his Fair Housing Act claim. AHEPA’s motion for summary judgment on plaintiff’s breach of contract claims is granted.

Upon the foregoing,

**IT IS ORDERED** that AHEPA’s motion for partial summary judgment (docket numbers 71 and 73) is granted. Plaintiff’s False Claims Act claim and his breach of contract claims are dismissed with prejudice.

**DATED** this 21st day of November, 2007.

  
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JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA