UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CARL BERNOFSKY, et al.	**NO. 5:09cv1919**
VERSUS	**JUDGE STAGG**
THE ROAD HOME CORPORATION, et al.	**MAGISTRATE JUDGE HORNSBY**

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

NOW INTO COURT, through undersigned counsel, comes Defendant ICF Emergency Management Services, LLC ("ICF"), which respectfully submits this reply memorandum in support of its Motion to Dismiss (Doc. No. 20). The opposition filed by Plaintiffs Carl and Shirley G. Bernofsky (collectively "Bernofsky") (Doc. No. 24, hereinafter "Bernofsky Opp.") fails to address, much less overcome, the fact that Bernofsky's claim of negligence against ICF is legally deficient. Instead, Bernofsky offers for the first time the theory that he is entitled to enforce ICF's contract with the State (to which he is not a party). This new contractual theory of liability is no more successful than his prior tort theory of liability. Bernofsky is not a party to the ICF contract, nor is he a third-party beneficiary of that contract. Finally, Bernofsky's opposition reinforces the fact that the State of Louisiana is a necessary party to this lawsuit, and, if the State is dismissed on sovereign immunity grounds, the suit must be dismissed under Rule 12(b)(7).

LAW AND ARGUMENT

I. Bernofsky Lacks Standing To Enforce The Terms Of ICF's Contract

Bernofsky offers in opposition the new theory that ICF has breached its contract with the State and Bernofsky is entitled to recover for these alleged breaches. Bernofsky Opp. ¶¶ 1-7, 19-25. This theory is without merit and must be dismissed.

Bernofsky does not allege that he is a party to ICF's Road Home Housing Manager Contract with the State of Louisiana (the "Contract"), nor could he. *See* Bernofsky Opp. Ex. A (the Contract). Accordingly, Bernofsky's only basis for enforcing the Contract against ICF would be to show that Bernofsky is the third-party beneficiary[1] of that Contract.

Under Louisiana law, "[a] stipulation pour autrui is never presumed. The party claiming the benefit bears the burden of proof." *Joseph*, 2005 -2364, p. 9, 939 So.2d at 1212. To prove a stipulation pour autrui, the Louisiana Supreme Court has identified a three-factor test (hereinafter the "*Joseph* Factors"):

> Our study of the jurisprudence has revealed three criteria for determining whether contracting parties have provided a benefit for a third party: 1) the stipulation for a third party is manifestly clear; 2) there is certainty as to the benefit provided the third party; and 3) the benefit is not a mere incident of the contract between the promisor and the promisee.

Id. at 8-9, 939 So.2d at 1212. Bernofsky cannot meet any of these three criteria.

The first *Joseph* Factor "is that the contract manifest a clear intention to benefit the third party; absent such a clear manifestation, a party claiming to be a third party beneficiary cannot meet his burden of proof." *Id.* at 9, 939 So.2d at 1212. Included in this factor is the requirement that if the law requires the contract to be in writing, "then the stipulation *pour autrui* must also be in writing." *Id.* at 15 n.13, 939 So.2d at 1215. Louisiana law requires contracts such as the Contract to be in writing. *See* La. R.S. 39:1502. Moreover, where the contract requires that the entire agreement must be in writing, any alleged stipulation pour autrui must likewise be in writing. *See Joseph* at 14-15, 939 So.2d at 1215-1216. Here, the Contract contains no written stipulation pour autrui, and, like the contract in *Joseph*, limits all understandings to those

[1] "Under Louisiana law, such a contract for the benefit of a third party is commonly referred to as a 'stipulation pour autrui.'" *Joseph v. Hosp. Serv. Dist. No. 2 of Parish of St. Mary*, No. 2005-2364, p. 7 (La. 10/15/06), 939 So.2d 1206, 1211.

embodied in the document itself. *See* Contract §§ 19.0 ("Complete Contract") & 10.0 ("Contract Modification"). Therefore, as in *Joseph*, a stipulation pour autrui would need to be in writing to be valid in this Contract. Bernofsky does not and cannot point to any such written stipulation and therefore fails to satisfy the first *Joseph* Factor.

The second *Joseph* Factor requires "certainty as to the benefit provided." *Id.* at 9, 939 So.2d at 1212. The Court explained that "[t]o create a legal obligation enforceable by the beneficiary[,] there must be certainty as to the benefit to accrue to the beneficiary." *Id.* (internal quotation omitted). Bernofsky fails to satisfy this criterion. Bernofsky offers two benefits that may accrue to him. First, he alleges that the benefit is the benefit of being contacted by ICF. Bernofsky Opp. ¶ 3. Second, he alleges that the benefit is a Road Home grant. *Id.* ¶ 4; *accord* ¶ 9. The mere fact that Bernofsky cannot clearly identify the benefit allegedly accruing to him confirms the absence of a stipulation pour autrui. Moreover, the State determined that Bernofsky is not eligible for a Road Home benefit. Given that one of ICF's responsibilities under the Contract is to "verify applicants' eligibility" (Contract § 1.1), it is difficult to understand how ICF could be liable for failing to deliver a benefit to which Bernofsky is not entitled. Because neither eligibility nor entitlement is certain, Bernofsky cannot meet the second *Joseph* Factor.

The third *Joseph* Factor requires that "the benefit cannot be a mere incident of the contract." *Joseph*, 2005-2364, p.9, 939 So.2d at 1212. Bernofsky's benefit from the Contract is such an incidental benefit. The *Joseph* Court cites *City of Shreveport v. Gulf Oil Corp.*, 431 F.Supp. 1 (W.D. La. 1975), *aff'd* 551 F.2d 93 (5th Cir. 1977) as illustrative of an incidental beneficiary situation.

> The city brought an action against the oil company alleging that the oil company failed to provide over 670,000 gallons of gasoline to the city ***pursuant to a contract existing between the oil company and the State of Louisiana***, thereby damaging the city.

> The court found the oil company/state contract provided some benefit to the city: in a time of serious inflation and energy shortage, Shreveport could purchase its fuel needs at a modest cost when compared to the market price. ***However, the contract was not made to obtain discharge of any legal obligation owed by the State to Shreveport. Furthermore, the advantage which would accrue to the City would not beneficially affect the State***. Thus, the advantage to the city was an easily seen incidental benefit to the City, which did not support a finding of third party beneficiary.

Joseph, 2005-2364, p.10, 939 So.2d at 1213 (internal quotations omitted) (emphasis added). As with that case, the Contract "was not made to obtain discharge of any legal obligation owed by the State to [Bernofsky]." *Id.* The program provides a grant to certain Louisiana homeowners. Nor does "the advantage which would accrue to [Bernofsky] … beneficially affect the State." *Id.* Grants received under the *Road Home* program are not contingent on any action by the applicant to benefit the State; there is not even a requirement that the recipient remain in the State to receive the grant. Bernofsky is, at most, an incidental beneficiary to the Contract.[2]

Because Bernofksy is not a third party beneficiary to the Contract, he cannot enforce it against ICF and these allegations must be dismissed.

[2] Under Bernofsky's theory, every Louisiana citizen is a third-party beneficiary to State contracts since every public contract inherently provides some benefit to the citizenry. This theory is not the law. *See, e.g., Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091, 37 So. 980, 986 (1905) (The Louisiana Supreme Court held that "necessarily all [of a city's] contracts are 'for the public benefit,' but it does not follow that they are all stipulations pour autrui in favor of the inhabitants individually, and that the latter may bring suit thereon."). Indeed, were it the law, public contracting would grind to a halt. *See Neighborhood Action Committee v. State*, No. 94-0807 (La. App. 1 Cir. 3/3/95), 652 So.2d 693, 696 ("Any benefit appellants expected to, or did, receive from Lease 1298 was merely an incident of the agreement between the State and the City. To hold otherwise would stop governmental action and bring municipal governance to a standstill. No theory of law or republican government supports the approach taken by the appellants." (internal citation omitted)).

II. Bernofsky Does Not Challenge ICF's Argument That His Negligence Claims Are Legally Insufficient

In its motion to dismiss, ICF set forth why Bernofsky's negligence claims against ICF lacked legal merit. Doc. No. 20-1 § I.B at 6-9. Bernofsky does not offer an opposition to this argument. Instead, Bernofsky offers a new theory that ICF has breached its contract with the State. Bernofsky Opp. ¶¶ 1-7, 19-25. While this theory is equally without merit, as previously discussed, Bernofksy's abandonment of the alleged negligence theory against ICF confirms the merits of ICF's motion to dismiss on this issue.

III. Bernofsky's 42 U.S.C. § 1983 Claims Against ICF Are Likewise Meritless

Bernofsky offers two new theories to support his section 1983 claim. First, he suggests that ICF's alleged breach of its contract with the State gives rise to a disparate treatment claim. Bernofsky Opp. ¶¶ 7-9. Next he states that because ICF is a publicly traded corporation, it must be a public actor for purposes of section 1983. *Id.* ¶ 15. Neither theory supports a 1983 claim.

Bernofksy's disparate treatment claim appears to be a "class of one" claim. *See id.* ¶ 9 (alleging that other registrants received benefits while Bernofsky did not); *accord Stotter v. Univ. of Texas-San Antonio*, 508 F.3d 812, 824 (5th Cir. 2007) ("[T]he Supreme Court [has] recognized an equal protection claim based on a 'class of one.' To establish such a claim, the plaintiff must show that (1) he or she was treated differently from others similarly situated and (2) there was no rational basis for the disparate treatment.") Bernofsky fails to satisfy this claim. He makes no allegation that any individual who failed to apply for the Road Home program was subsequently awarded benefits. Likewise, he does not allege than any individual who only registered with the Road Home Registry was subsequently awarded benefits. As the State explained in its letter to Bernofsky (Compl. Ex. P), Bernofsky is not eligible for Road Home benefits because he never applied to the Program. Treating homeowners who applied to the

Program before a mandatory deadline differently from homeowners who did not apply before the deadline is a rational basis for the different treatment. Accordingly, Bernofsky's class of one disparate treatment claim is legally insufficient and must be dismissed.

Likewise, Bernofsky cannot convert ICF into a state actor merely because ICF is a publicly-traded company. Bernofsky Opp. ¶ 15. The touchstone for a section 1983 claim is whether actions were taken under color of state law. *Cornish v. Correctional Services Corp.*, 402 F.3d 545, 549 (5th Cir. 2005). Because ICF is a private corporation – i.e., not owned or controlled by a public body such as a State, Native American tribe, or the Federal Government – it is necessary for section 1983 purposes to determine whether any actions of ICF "can be fairly attributable to the State" and trigger potential section 1983 liability. *Id.* at 549-550.[3] As ICF showed in its Motion to Dismiss (Doc. No. 20-1 § I.C at 10-11), ICF's alleged actions, even if negligent, do not arise to the level of state action necessary to trigger potential section 1983 liability. Therefore, Bernofsky's section 1983 claims must be dismissed.

IV. The State Is An Indispensable Party To The Suit

Bernofsky's Opposition reinforces the fact that the State is an indispensable party under Rule 19 whose absence is fatal to the continued viability of the suit. Indeed, Bernofsky alleges that after ICF's contract had expired, OCD was instructed by Senator Landrieu to take action on Bernofksy's application, but did not do so. Bernofsky Opp. ¶ 24; *accord id.* ("The refusal of OCD to follow through on Landrieu's request contributed to the deprivation of plaintiffs' rights and was in defiance of a U.S. senator's recommendation. In a telephone conversation with Ms.

[3] It is not the case that a private contractor is a state actor merely because the contractor is hired by the state under a public contract. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.").

Judy Johnson-White of the Road Home program on July 28, 2009, ***Bernofksy was informed that OCD was the proper entity with which to negotiate***." (emphasis added)).

Bernofsky confirms that "OCD is responsible for handling the finances of the Road Home program" and "the Louisiana Recovery Authority (LRA) is responsible for developing the program's policies." *Id*. ¶ 25. Given that Bernofsky's alleges an improper policy (i.e. the Road Home application requirements and deadlines) and seeks benefits from the Road Home, the State is a necessary party to any such adjudication of these issues. This necessity is reinforced by the fact that ICF no longer manages the program at issue.

Because the State is necessary, the only remaining issue is whether the State can remain a party to this lawsuit in spite of its sovereign immunity. For the reasons previously argued by the State (Doc. No. 19) and ICF (Doc. No. 20), it cannot. Bernofksy offers only irrelevant and distinguishable cases to counter these arguments. Bernofsky Opp. ¶¶ 10-14.[4] Given that the State cannot remain a party to this suit and that it must if this suit is to go forward, the suit should be dismissed under Rule 12(b)(7).

CONCLUSION

For the above and foregoing reasons, as well as those offered in ICF's motion to dismiss (Doc. No. 20), Bernofsky's suit against ICF must be dismissed in its entirety.

[4] Bernofsky cites, in order, a Title IX suit, a suit finding that the voluntary removal to federal court of a lawsuit by a state agency waives the agency's sovereign immunity, and a lawsuit brought against the State of Louisiana in state court. None of these authorities supports Bernofsky's contention that he can sue state agencies in federal court in connection with the Road Home program. Indeed, the Eastern District of Louisiana recently dismissed a similar Road Home applicant suit on immunity grounds. *See Robinson v. Road Home Corporation*, No. 09-4782, 2010 WL 148364 (E.D. La. Jan. 12, 2010).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record via the Case Management/Electronic Case Filing system of the United States District Court for the Western District of Louisiana, this 25th day of February, 2010. For those parties not participating in the CM/ECF system, this pleading has been served by electronic mail and first class U.S. mail, postage prepaid and properly addressed.

/s/ Michael C. Drew