FILED
United States Court of Appeals
Tenth Circuit

March 29, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE UNITED STATES OF AMERICA EX REL. MICHELE COFFMAN,

Plaintiff - Appellant,

v.

THE CITY OF LEAVENWORTH, KANSAS,

Defendant - Appellee.

No. 18-3156
(D.C. No. 2:14-CV-02538-JAR)
(D. Kan.)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **KELLY**, Circuit Judges.

Michele Coffman appeals the district court's grant of summary judgment in favor of the City of Leavenworth, Kansas, on her claims under the False Claims Act (FCA), 31 U.S.C. §§ 3729-33. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. Background

Coffman was employed between 2010 and 2013 at the City's wastewater treatment plant (WWTP). In 2014, she brought a *qui tam* action against the City under the FCA.[1] The district court granted summary judgment in the City's favor. She addresses on appeal only her FCA claims alleging that the City fraudulently billed three federal agencies for sewer service.

Coffman claims that the City submitted monthly sewer bills to the United States Army, the Bureau of Prisons, and the Veterans Administration that falsely implied that the City had complied with all applicable environmental laws. She claims that the City's certification of compliance was false because it had violated environmental laws in four specific ways:

(1) the City allowed sewage to leak into a creek from a broken sewer pipe that it did not repair for 15 months, allegedly in violation of the Clean Water Act (CWA) and the City's discharge permit (NPDES permit[2]);

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[1] Coffman asserted additional claims against the City, including FCA retaliation and state-law claims for whistle blower retaliation, retaliatory discharge, and negligent infliction of emotional distress. These claims are not at issue in this appeal.

[2] Pollutant dischargers can obtain a permit through the National Pollutant Discharge Elimination System (NPDES) permit program, administered by the EPA and authorized states. *See* 33 U.S.C. § 1342(a)-(b). "Noncompliance with a permit constitutes a violation of the [CWA]." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). The EPA delegated to the Kansas Department of Health and Environment (KDHE) the authority to regulate wastewater discharge in the state of Kansas.

(2) the City discharged treated effluent into the same creek to improve its smell and color during the period that the broken sewer pipe was leaking, also allegedly in violation of the CWA and its NPDES permit;

(3) the City used a "Vactor Truck" (an industrial truck equipped with a vacuum) to clear out objects from the sewer system, after which it dumped the solid contents of the truck onto the ground in an area behind the WWTP, allegedly in violation of a federal regulation; and

(4) per a consent order issued in December 2015, the EPA found that between March 2010 and March 2014 the City had violated its NPDES permit by discharging pollutants at non-permitted locations due to sanitary sewer overflows.

There is no dispute that the City did not inform its federal agency sewer customers of any of these issues.

The district court held that Coffman failed to present evidence that would lead a reasonable trier of fact to find that any of the implied false certifications were material to the federal agencies' decisions to pay their monthly invoices for wastewater treatment services. The court also concluded that Coffman failed to present evidence that the invoices were submitted with the requisite scienter under the FCA.

II. Discussion

We review the district court's grant of summary judgment de novo. *U.S. ex rel. Thomas v. Black & Veatch Special Projects Corp.*, 820 F.3d 1162, 1168 (10th Cir. 2016). Summary judgment is appropriate "if the movant shows that there

is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We view the factual record and draw all reasonable inferences in Coffman's favor. *See Thomas*, 820 F.3d at 1168.

The FCA imposes liability when a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). Coffman's complaint alleged that the City made legally false requests for payment. *See U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168 (10th Cir. 2010) ("Claims arising from legally false requests . . . generally require knowingly false certification of compliance with a regulation or contractual provision . . . ."). And she relied on an implied false certification theory of liability. *See id.*; *see also Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 1995 (2016) (holding that, "at least in certain circumstances, the implied false certification theory can be a basis for liability"). "According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment." *Escobar*, 136 S. Ct. at 1995.

An FCA claim must satisfy materiality and scienter requirements, both of which are "rigorous" and strictly enforced. *Id.* at 2002. Here, the district court held that Coffman failed to show a material factual dispute as to either materiality or scienter. Regarding scienter, Coffman was required to prove that the City "knowingly" presented a false claim to the government for payment or approval. § 3729(a)(1)(A). "[K]nowingly . . . mean[s] that a person, with respect to information": (1) "has actual knowledge of the information"; (2) "acts in deliberate

ignorance of the truth or falsity of the information"; or (3) "acts in reckless disregard of the truth or falsity of the information." § 3729(b)(1)(A) (internal quotation marks omitted).

Accordingly, "[t]he proper focus of the scienter inquiry under § 3729(a) must always rest on the defendant's 'knowledge' of whether the claim is false . . . ." *U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952-53 (10th Cir. 2008). Coffman "must show more than a falsehood—[she] must show that [the City] *knowingly* presented a false claim for payment." *U.S. ex rel. Smith v. The Boeing Co.*, 825 F.3d 1138, 1149 (10th Cir. 2016). And Coffman "must prove scienter as an element; it cannot be presumed." *Burlbaw*, 548 F.3d at 955.

The City argued in its summary judgment motion that Coffman could not proffer evidence from which a reasonable trier or fact could find that it acted with scienter. *See* Aplt. App., Vol. I at 124-31; *id.* at 127-30 (citing evidence that KDHE was aware of the issues alleged by Coffman and did not consider them to be violations of the City's NPDES permit). And in granting the City's motion, the district court held that the evidence, viewed in the light most favorable to Coffman, failed to demonstrate that the City submitted wastewater treatment invoices to the federal agencies with the requisite scienter.

On appeal, Coffman argues in her opening brief that "[s]cienter can be found within a corporate entity even if there is not a single individual responsible for both compliance and contracting issues." Aplt. Opening Br. at 51. She next contends that, elsewhere in her brief, she has shown that "the City did not comply with

environmental laws in numerous instances." *Id.* at 53. Finally, Coffman argues that "the fact that environmental compliance was the very essence of the contracts for wastewater treatment can establish scienter that environmental compliance was material [to the City's federal agency sewer service customers]." *Id.* at 54; *see also id.* at 55 ("[A] reasonable juror could conclude that the City had the scienter that the government saw the requirement as material.").

What Coffman does *not* address in her opening brief is evidence that the City knew it was violating its NPDES permit or environmental laws when it submitted monthly invoices to the federal agencies. Thus, Coffman's opening brief fails to address the very issue she must prove to succeed on her FCA claim: that the City *knowingly* presented a false claim to the government. *See Smith*, 825 F.3d at 1149 (holding that, even assuming products defendant sold to the government failed to comply with federal regulations, the record did not support the relators' contention that defendant knew about the nonconformities when submitting claims for payment).

An appellant's opening brief must identify "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). "Stated differently, the omission of an issue in an opening brief generally forfeits appellate consideration of that issue." *Id.* We conclude that Coffman's opening brief does not adequately raise the contention that evidence in the

record demonstrates that the City submitted invoices to the federal agencies with the requisite scienter.

Coffman does address the critical scienter issue in her reply brief, but that too is insufficient to preserve the issue for appellate review. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) ("This court does not ordinarily review issues raised for the first time in a reply brief."); *Starkey ex rel. A.B. v. Boulder Cty. Soc. Servs.*, 569 F.3d 1244, 1259 (10th Cir. 2009) ("The same rationale applies when the only evidence supporting a claim is not cited until the reply brief."). Although Coffman responds to the City's contention that the record fails to demonstrate scienter, her failure to address the City's knowledge of permit or environmental-law violations in her opening brief deprived the City of the opportunity to respond to her belated factual assertions and arguments. *See Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994) ("[T]o allow an appellant to raise new arguments at this juncture would be manifestly unfair to the appellee who, under our rules, has no opportunity for a written response." (internal quotation marks omitted)). We see no compelling reason in this case to deviate from the rule that contentions not raised in an opening brief are forfeited.[3]

Coffman's FCA claims required her to prove scienter. Because she forfeited on appeal her challenge to the district court's holding that the record fails to

[3] We have sometimes considered arguments raised for the first time in a reply brief because the appellant was responding to a contention raised in the appellee's brief. *See, e.g., Sadeghi v. I.N.S.*, 40 F.3d 1139, 1143 (10th Cir. 1994). The circumstances in this case are distinguishable.

demonstrate that the City submitted invoices to the federal agencies with the requisite scienter, we affirm the district court's grant of summary judgment in favor of the City on Coffman's FCA claims.

III. Conclusion

The district court's judgment is affirmed.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge